RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES

V.

OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD
AKHBAR FARNAD

NO. 050008

VOLUME IX OF ___ TOTAL VOLUMES

2ND VOLUME OF REVIEW EXHIBITS (RE):
RES 54-64
JANUARY 11 & 12, 2006 SESSIONS
(REDACTED VERSION)

United States v. Omar Ahmed Khadr, NO. 050008

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV*	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V*	Federal Litigation at U.S. District Courts Not Filed by Counsel in *United States v. Khadr*
VI*	Selected filings and U.S. District Court decisions in *United States v. Khadr*
VII*	Transcript (Jan. 11 and 12, 2006 sessions)

* Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Omar Ahmed Khadr, NO. 050008

INDEX OF VOLUMES

VOLUME NUMBER	SUBSTANCE OF CONTENTS
VIII†	Review Exhibits 1-53 (Jan. 11 and 12, 2006 sessions)
IX†	Review Exhibits 54-64 (Jan. 11 and 12, 2006 sessions)

† Interim volume numbers. Final numbers to be added when trial is completed.

UNITED STATES V. OMAR AHMED KHADR,
NO. 050008—2ND VOLUME OF REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

2ND VOLUME OF REVIEW EXHIBITS: RES 54-64 (162 PAGES)
SESSION OF JAN. 11 & 12, 2005

UNITED STATES V. OMAR AHMED KHADR,
NO. 050008—2ND VOLUME OF REVIEW EXHIBITS

UNITED STATES V. OMAR AHMED KHADR,
NO. 050008—2ND VOLUME OF REVIEW EXHIBITS

UNITED STATES V. OMAR AHMED KHADR,
NO. 050008—2ND VOLUME OF REVIEW EXHIBITS

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**DEFENSE** Narrative of Conversations Between Presiding Officer and Counsel During An 8-5 Session on 10 January 2006 **11 January 2006**

The defense in the above-styled case offers the following narrative regarding what transpired at a conference pursuant to MCI No. 8, paragraph 5, on 10 January 2006.

1. **On off-the-record 8-5 session was convened by Presiding Officer ("PO") Colonel Chester on January10, 2006. The session began at approximately 11:05 a.m. and ended at approximately 12:00 p.m. In attendance were the PO, Assistant to the PO Mr. Hodges, Major [redacted] Captain Merriam, and Professor Ahmad.**

2. **The PO stated that this was an 8-5 session. Captain Merriam objected to the session, referencing the motion that the defense has previously filed on the matter. The PO noted the objection, but stated that we were going to go forward with the 8-5.**

3. The PO stated that he does not make rulings at 802 or 8-5 hearings. He stated that the 8-5 is useful for scheduling purposes. He stated that he believes it is good for all sides to come together to figure out what the issues are.

4. **Captain Merriam stated that his concern with the 8-5 was not for scheduling purposes, but instead with the discussion of substantive issues which should instead be heard on the record.**

5. The PO stated that he DOES NOT RULE at an 8-5, and that it is his practice that after he has made a ruling, he does not want to hear more argument about a specific issue or motion. He stated that the parties may ask permission to re-open the matter of for him to reconsider, particularly if there is new information, or if a party believes there is something that he did not consider in making his ruling.

6. **The PO stated his intention to make this as full and fair a trial as he could.**

7. The PO spoke about the script he intends to use at the 1/11/06 open session. He stated that he does not follow the Naval Marine Corps script. He stated that he was in the process of making some changes to the script that had previously been circulated to the parties by the APO. Referring to the script for the commission hearing, he stated, "To be honest, this is new to all of us."

8. The PO inquired into the status of Professor Rick Wilson. Professor Ahmad informed him that Professor Wilson is civilian defense counsel, that he is not present in Guantántamo, and that he has not yet made an entry of appearance.

9. **Mr. Hodges asked Professor Ahmad about Omar's intentions regarding representation by Professor Wilson. Professor Ahmad stated that he felt this was getting beyond a scheduling issue and into a substantive matter that was not appropriate for an 8-5.**

10. The PO stated that during the 1/11/06 open session, he intended to go through counsel rights with Omar.

11. **The PO inquired about the status of the protective orders that had been proposed by the prosecution and to which Captain Merriam had provided objections. He asked if there had been any progress made on this. Major Groharing replied that there had not. Mr. Hodges stated that the parties should do a side-by-side comparison of the competing protective orders and provide that to the PO. Captain Merriam then stated that he believed a discussion of the protective order issues was not appropriate for an 8-5. The PO stated that he wanted to determine if the parties were still negotiating or if they had come to an impasse, at which point he would need to make a decision. He concluded that the parties are at an impasse and that he would decide on the matter at the 1/11/06 open session.**

12. **The PO raised the issue of motions. He stated his desire to hold a hearing in late February to deal with "big broad sweep motions," including motions regarding the constitutionality and jurisdiction of the military commission, and whether proceedings should go forward. He stated that he wanted to hold a hearing on discovery issues and other motions in mid-March. Captain Merriam objected to this, noting that the pending IMC request of the defense precluded his ability to make such commitments. The PO responded that "we need to get this going," and that if Lt. Col. Vokey comes on, these dates can be readjusted. He stated that setting a date often moves people, and that this might facilitate a decision on Lt. Col. Vokey's IMC request. Mr. Hodges added that setting a date can move things forward.**

13. Mr. Hodges described how the commission proceeding in the case of David Hicks was expected to go. He stated that in that case they planned a preliminary hearing on law motions, and then a second hearing for other matters.

14. **The PO discussed his familiarity with Lt. Col. Vokey, who practices before the PO. The PO stated that Lt. Col. Vokey has applied to be a military judge, and had asked the PO for a letter of recommendation. The PO stated that he did not provide such a letter, but only because of an inability to do so before the relevant deadline. The PO stated that otherwise he would have provided a**

recommendation, and that it would have been a very strong letter. He stated that he thinks very highly of Lt. Col. Vokey.

15. **Returning to the motions issue, the PO directed the parties to come up with a proposed briefing schedule by 1/11/06, and again suggested a hearing on initial motions the week of 2/27/06, and a hearing on other motions in mid-March.**

16. **The PO next discussed voir dire. He stated that he intends to give the parties the opportunity to conduct voir dire of him at the 1/11/06 open session. He stated that if Lt. Col. Vokey comes on the case after this session, he will permit Vokey to conduct additional voir dire, but he won't be able to ask questions that had been asked previously. The PO stated that if we didn't want to ask any questions at the 1/11/06 open session, we didn't have to.**

17. The PO asked who was lead counsel for the defense. Capt. Merriam stated that we could not decide that until the IMC issue was decided. The PO stated that the defense should decide who is lead and then inform him.

18. The PO discussed his relationship to Captain [redacted]. He stated his understanding that in another military commission proceeding, there was a challenge to or controversy relating to Captain [redacted] as a PO. Capt. [redacted] is the PO's reporting senior. He writes the PO's fitness reports. The PO stated that he had one conversation with Capt. [redacted] about the commissions, when Col. Chester was first selected as a PO. The PO stated that in that conversation, Capt. [redacted] said something like "God help you," but that they had no further discussion on the matter.

19. Maj. [redacted] stated that he had provided a copy of the charge sheet in Arabic to the defense. The PO asked if this had been provided to Omar, and Professor Ahmad stated that it had. The PO asked if there were any problems with the translation, and Professor Ahmad stated that we had not yet had it evaluated by an independent translator.

20. **The PO asked about whether an interpreter would be necessary for the 1/11/06 open hearing. Professor Ahmad stated our view that we did not believe one would be necessary for this preliminary hearing, but we were not sure of the extent of Omar's ability to understand complex concepts and proceedings in English. Professor Ahmad stated that we wanted to reserve the right to ask for an interpreter at a later session based on how things go at the first one.**

21. **The PO stated that anything we want to raise on the record we can do. He stated that we could write that down in blood. He said that he would give us a full opportunity to state on the record any issues we thought were necessary to protect the interests of our client.**

22. The PO stated that he would have an interpreter available if we decided that we need one. Mr. Hodges stated that this might not be possible because the interpreters are on a contract. The PO stated that this was what he wanted.

23. The PO stated that if any point translation becomes an issue, we should just raise it. He stated that if at any time it seems that Omar is not understanding the proceedings, we should bring that to his attention. He expressed his commitment to Omar understanding the proceedings as fully as possible. He stated that Omar might not always agree with the outcome, but he wanted Omar to understand what was going on.

24. The PO informed us that he was supposed to retire in April 06, but that he has asked to go to 1 July 06, with a one year extension, in order to complete work on the commission.

25. The PO stated that he has been instructed by the Appointing Authority to wear a robe during commission proceedings. He stated that he does not like to wear a robe, and that he does not usually do so, as it is not Marine Corps practice.

26. Maj. [redacted] asked if we should set another 8-5 for 1/11/06. Capt. Merriam objected, stating he did not see a need for it. Over that objection, the PO scheduled an 8-5 for 1300 on 1/11/06.

27. Maj. [redacted] asked if co-counsel would be able to argue issues in the session. The PO stated his practice of only allowing one lawyer on each side to argue a particular issue. He said that at times he will deviate from this rule, but that that is a privilege that has to be earned by the lawyers on each side, based on their professionalism.

28. Maj [redacted] stated that he had exhibits supporting the text of his email regarding the government's view of the need for a protective order. He asked if he could submit these exhibits. The PO said that he could.

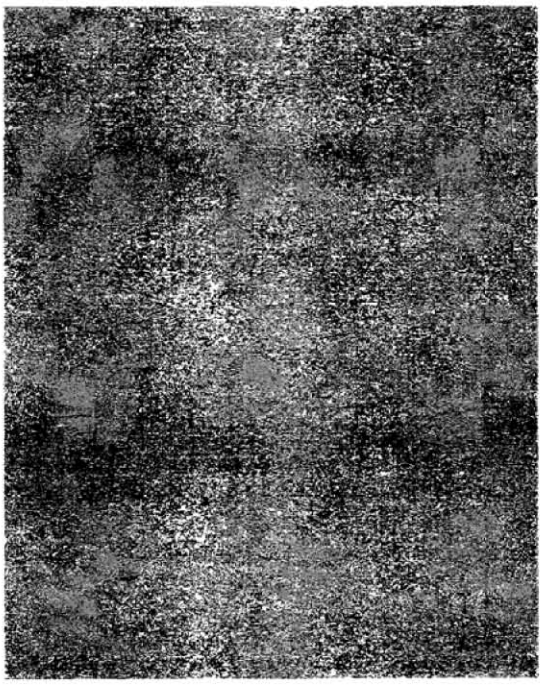
29. The PO stated that the Appointing Authority has given the POs authority to issue a POM governing attire in commission sessions, including that of the accused. The PO stated that he would be writing that POM. He stated his view that the accused should be permitted to wear culturally appropriate clothing. He said that what he might wear to church isn't necessarily what a detainee would wear to a mosque. Stated that he did not want any accused to be in a prison jumpsuit, and that he would probably not allow it. He said he wanted the accused to be in appropriate civilian attire that is culturally appropriate for the accused.

30. The PO reiterated his commitment to making the proceeding as full and fair as he possibly could.

31. The 8-5 session ended at approximately 12:00 p.m.

By: _____
JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law
[redacted]
Washington, DC 20016
[redacted]
Civilian Defense Counsel for Omar Ahmed Khadr



UNITED STATES OF AMERICA	DEFENSE
v.	Motion for Order Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements
OMAR AHMED KHADR	**12 January 2006**

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr*, pursuant to the briefing schedule set by the Presiding Order on January 11, 2006.

Relief Requested

2. The defense moves for two forms of relief. First, the defense seeks an order from the Prosecution to the Chief Prosecutor and all members of the prosecution to refrain from making inappropriate extradjudicial statements, in violation of, *inter alia,* Rules 3.6 and 3.8 of the Air Force Rules of Professional Conduct and Standards for Civility, the Rules of Professional Conduct for the District of Columbia, and the Rules of Professional Conduct for North Carolina, as well as Air Force Instruction 51-201. Second, the defense requests that the Presiding Officer order the Prosecution to issue a retraction for those inappropriate extrajudicial statements already made, or to take other steps necessary to remediate past inappropriate statements.

Synopsis

3. This motion concerns inappropriate, prejudicial statements made by the Chief Prosecutor for the Office of Military Commissions ("Chief Prosecutor") regarding Omar Khadr at a government-sponsored press conference held on January 10, 2006, one day before the official start of Omar's military commission proceedings. The relevant rules of professional conduct governing the Chief Prosecutor prohibit the making of such comments. Specifically, rules relating to special responsibilities of a prosecutor and pre-trial publicity state in mandatory terms that a prosecutor shall not make extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused or of materially prejudicing an adjudicative proceeding in the matter. The statements of the Chief Prosecutor did not merely skirt the line, they obliterated it.

4. Those statements were made in violation of numerous ethical rules by which the Chief Prosecutor and the prosecutors in the case were bound, and therefore constitute prosecutorial misconduct for which an order of the Presiding Officer is necessary to prevent such misconduct in the future, and to remediate that which has already transpired. Without such intervention of the Presiding Officer, the fairness of the process afforded Omar will be severely compromised. The defense does not bring this motion lightly, but is compelled to do so in light of the egregious nature of the multiple ethical violations committed by the Chief Prosecutor, and in order to protect Omar from further harm done by the prosecution's extrajudicial comments.

Burden of Proof

5. As the moving party, the burden of proof for this motion is on the defense.

Facts

The defense submits the following facts with respect to this issue:

6. On January 10, 2006, the Office of Military Counsel convened a press conference at Guantánamo Bay, Cuba, in which prosecution and defense counsel for the above-captioned case were invited to appear. On information and belief, approximately 30 press reporters were in attendance, including television, newspaper, and radio reporters from news outlets such as the *New York Times*, the *Miami Herald*, the *Wall Street Journal*, and the Associated Press. There were also numerous international correspondents in attendance, particularly from Omar's home country of Canada. Reporters for military news services, including the Armed Forces Press Service, were in attendance as well.

7. At the press conference, the Chief Prosecutor, Colonel Morris D. Davis, made extensive comments about the military commission case against Omar Khadr. These comments, discussed in greater detail below, included his opinions regarding Omar's guilt or innocence, his opinions regarding the merits of the case, statements regarding the identity and expected testimony of a prospective witness, and statements that likely will increase public condemnation of Omar. Among the statements made by the Chief Prosecutor are the following: [1]

[1] Accounts of the Chief Prosecutor's comments are drawn from news stories covering the January 10 press conference because neither a full transcript nor an audio or video recording of the press conference was available at the time the motion was made. The defense did make efforts, immediately upon the termination of the commission session on January 11, 2006, to obtain a full record. However, one was not expected to become available until shortly after this motion was due. The defense respectfully reserves the right to supplement the present motion, or to renew it at a later date if necessary, when a full record of the press conference becomes available.

a. "It's my belief that the evidence will show he is indeed a terrorist." *See* Michelle Shephard, "T.O. teen 'indeed a terrorist,' U.S. insists; Prosecutor says Khadr deserves life," *Toronto Star,* Jan. 11, 2006 at A1, attached hereto as Exhibit A.

b. "Normally, Mr. Khadr and his family spend Eid [a major Muslim holiday] with the Osama bin Laden family so I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden. He's a terrorist." *Id.*

c. "Well (at trial) you'll hear about (Army Sgt. 1st Class) Chris Speer, an American medic who was murdered by Mr. Khadr." *See* R.E. 54 at 15, Kathleen T. Rhem, "Lawyers Address Throny Issues on Eve of Military Commissions Hearings," *Armed Forces Information Service,* Jan. 10, 2006.

d. "Well when we get past this defense facade of, 'It ain't fair,' and we get to the facts, you'll get to hear from (former Army Sgt.) Lane Morris, who is not almost blind in one eye, he lost an eye because of Mr. Khadr." *See id.*

e. "You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans." *See* Beth Gorham, "U.S. prosecutor in Khadr case blasts sympathetic views of Canadian teen," *Brandon Sun,* Jan. 11, 2006, attached hereto as Exhibit B.

f. Responding to statements from human rights advocates questioning what the prosecution of a minor says about U.S. values, the Chief Prosecutor stated, "Well, what it says about who we are is we're going to hold terrorists accountable when they kill American military forces". *See* R.E. 54 at 15 at Rhem, *Lawyers Address Thorny Issues.*

g. The Chief Prosecutor also stated that he found "nauseating" what he characterized as sympathetic portrayals of Omar in the media. *See* Mercury News Services, "Canadian not innocent, prosecutor in U.S. argues," *Kitchener Record,* January 11, 2006, attached hereto as Exhibit C.

h. The Chief Prosecutor suggested that Omar has fabricated claims of torture while in U.S. custody. *See* Sheldon Alberts, "Khadr trained killer, U.S. prosecutor says," *Star Phoenix,* Jan. 11, 2006, attached hereto as Exhibit D.

8. The comments of the Chief Prosecutor at the January 10 press conference were widely reported in the United States and internationally. As reflected in the news articles that previously were submitted as R.E. 54, as well as those submitted with the present motion, the Chief Prosecutor's comments were reported by a U.S. military news service, American newspapers, and numerous Canadian television programs, newspapers, and radio programs. The Department of Defense website has also prominently featured a story reporting the Chief Prosecutor's comments.

9. The Chief Prosecutor is a Colonel in the United States Air Force. On information and belief, he is a member of the bars of the District of Columbia and North Carolina. *See* R.E. 54 at 1, Biography of Colonel Morris D. Davis. The prosecutors in this case are all members of the Naval Service. Their state bar membership is unknown.

Argument

The Prosecution is Bound by State and Branch-Specific Rules of Professional Conduct.

10. Appointing Authority Regulation No. 3 provides that state and branch-specific rules of professional conduct govern the conduct of attorneys in "in connection with a proceeding before, during and after a trial by military commission." Therefore, the Chief Prosecutor is bound by the Air Force Rules of Professional Conduct and Standards for Civility, and the prosecutors in this case are bound by the Naval Rules of Professional Conduct . In addition, the Chief Prosecutor is bound by the rules of professional conduct of the District of Columbia and North Carolina, and the prosecutors in the case are bound by the ethical rules of all states or territories in which they are admitted to practice law.

The Chief Prosecutor Committed Prosecutorial Misconduct By Making Numerous Inappropriate, Prejudical Statements About Omar Khadr at the January 10 Press Conference.

11. As the Court of Appeals for the Armed Force has stated, "Prosecutorial misconduct can be generally defined as action or inaction by a trial counsel in violation of some legal norm, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). As explained in greater detail below, the numerous prejudicial statements made about Omar Khadr by the Chief Prosecutor violated multiple rules of professional conduct that are binding on him. The Chief Prosecutor's statements therefore constitute prosecutorial misconduct.

The Chief Prosecutor Violated His Ethical Obligations By Making Extrajudicial Comments That Serve to Heighten Public Condemnation of Omar Khadr.

12. The Chief Prosecutor is bound by ethical rules that prohibit him from making extrajudicial comments that serve to heighten public condemnation of an accused individual. It appears that the Chief Prosecutor's comments at the January 10 press conference were intended to do exactly that.

13. Rule 3.8(f) of the Rules of Professional Conduct for the District of Columbia states: "The prosecutor in a criminal case shall not ... [e]xcept for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused." *See* R.E. 54 at 6. Naval Rule of Professional Conduct 3.8(a)(6)[2] includes similar language (a copy of relevant Naval Rules, including 3.8, is attached hereto as Exhibit E), as does Rule 3.8 of the North Carolina rules.[3] The purpose of this rule is not limited to ensuring a fair trial for the accused, though it does enhance fairness. Rather, the rule recognizes the important reputational concerns of the accused, and seeks to protect them from unnecessary public contempt.

14. It seems clear that the Chief Prosecutor's comments at the January 10 press conference were designed to increase the level of public opprobrium directed toward Omar Khadr. This is evident from the Chief Prosecutor's statement that he found "nauseating" what he viewed to be sympathetic portrayals of Omar in certain media stories. In light of this comment, the Chief Prosecutor's subsequent comments can

[2] Although the Naval Rules do not apply to the Chief Prosecutor, they do apply to the prosecutors in this case.

[3] North Carolina's Rule 3.8(f) sets a lower standard for the prosecution, prohibiting only those extrajudicial statements that have "a substantial likelihood of heightening public condemnation of the accused." *See* R.E. 54 at 12. However, because the Chief Prosecutor is bound by the ethical codes of each jurisdiction in which he is barred, he still must meet the higher standard of the D.C. rule. In any event, as the extensive coverage of the Chief Prosecutor's statements in Canada demonstrates, even the North Carolina standard is met.

reasonably be understood as an attempt to decrease the level of sympathy for Omar, which is tantamount to increasing the level of public condemnation of him.

15. The statement of charges in this case, or the prosecution's recitation of the nature of the charges against Omar, inform the public of the nature and extent of the prosecutor's action, and may serve a legitimate law enforcement purpose, but the Chief Prosecutor's comments—such as his repeated, declarative statements that Omar is a terrorist, or his attempt to associate Omar with Osama Bin Laden—do not. Rather, the only reasonable interpretation of these and several other gratuitous and provocative comments is that they were part of a deliberate campaign to rebut a perceived sympathy for Omar. This is wholly inappropriate conduct for a prosecutor in light of the special responsibilities he owes to the accused.

16. Comments to the ethical rules warn against exactly the type of conduct in which the Chief Prosecutor has engaged. For example, the comment to D.C. Rule 3.8 states in relevant part:

> In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. **Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused."**

R.E. 54 at 7, D.C. Rules of Professional Conduct, Rule 3.8, Comment 2 (emphasis added). It is exactly the type of publicity that the rule seeks to discourage for prosecutors—namely, televised press conferences—in which the Chief Prosecutor aggressively engaged. *See* Exh. A, Shephard, *Prosecutor calls teen a terrorist* (describing "a tough-talking Col. Morris Davis [who] began his prosecution in front of reporters yesterday").

17. The Chief Prosecutor appears to have been quite successful in getting his message out to the media. Numerous newspaper accounts spotlighted his anger toward the purported sympathetic portrayals of Omar in the media. A story from the *Guelph Mercury* in Ontario, Canada—where Omar's family lives—is representative. Its headline states: "Prosecutor calls teen a terrorist; U.S. military prosecutor in Khadr case blasts sympathetic view of Canadian youth". *See* Michelle Shephard, *Guelph Mercury,* Jan. 11, 2006, attached hereto as Exhibit F. Moreover, the Chief Prosecutor's statements achieved a high level of media market penetration, particularly in Canada, where newspapers in every corner of the country published his comments. A sampling of these articles is attached hereto as Exhibit G.

18. It is difficult to accept the numerous inflammatory statements made by the Chief Prosecutor about Omar as anything other than a public relations gambit. Indeed, little more than a year ago, the Chief Prosecutor published a lengthy journal article on how the U.S. military can better manage public opinion. *See* R.E. 54 at 24, Morris Davis, "Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age," *Air & Space Power Chronicles*, Nov. 5, 2004, *available at* http://www.airpower.maxwell.af.mil/airchronicles/cc/davis1.html. In

that Article, Colonel Davis writes, "The military's reluctance to engage the media in the wake of a perceived scandal in many cases perpetuates the problem by allowing the complainant, the media and other interested parties to shape the battlefield in the struggle to influence public opinion.... The military's rules of engagement in the competition for the public's opinion need to be reassessed." *Id., see* R.E. 54 at 25. Colonel Davis's conclusion, entitled "Offensive Engagement in the Battle for Public Opinion," urges a more proactive approach to controversies involving the military, in order to take control of the story. *Id., see* R.E. 54 at 38. While this may be sound public relations strategy, it is not consistent with the prosecution's ethical obligations.

The Chief Prosecutor Violated His Ethical Obligations Regarding Pretrial Publicity By Expressing Opinions Regarding Omar's Guilt.

19. In at least two instances at the January 10 press conference, the Chief Prosecutor expressed his opinion as to Omar's guilt for offenses with which he is charged. First, he stated, "It's my belief that the evidence will show he is indeed a terrorist." This is a textbook example of an inappropriate extrajudicial statement by a prosecutor. Second, the Chief Prosecutor stated at trial the public will hear about "Chris Speer, an American medic *who was murdered by Mr. Khadr*" (emphasis added).

20. Expression of such opinions violates the prosecution's ethical obligations regarding pretrial publicity. Specifically, Rule 3.6 of the D.C., North Carolina, Air Force and Naval Rules, all prohibit such a statement (although there is some variation among them). D.C. Rule 3.6 provides:

> A lawyer in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be

> disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat to the impartiality of the judge or jury.

The Naval Rule, while slightly different in its formulation,[4] provides that ordinarily one should not discuss pretrial "any opinion as to the guilt or innocence of an accused..." Naval Rule 3.6(b)(2). Section 12.6.2.3 of Air Force Instruction 51-201 includes a similar general prohibition. (A copy of this Instruction is attached hereto as Exhibit H. This Instruction states on its cover page, "COMPLIANCE WITH THIS PUBLICATION IS MANDATORY.") The Chief Prosecutor's statements are in contravention of these provisions. *See also id.*, Sec. 12.6.1 ("...Usually, extrajudicial statement should include only factual matters and should not offer subjective observations or opinions.")

The Chief Prosecutor Violated His Ethical Obligations Regarding Pretrial Publicity By Making Statements Concerning the Identity and Credibility of Prospective Witnesses.

21. Extrajudicial statements concerning the identity and credibility of prospective witnesses are ordinarily understood to have a substantial likelihood of prejudicing a criminal proceeding, and therefore are generally prohibited. *See* Exh. H, Air Force Instruction 51-201, Sec. 12.6.2.6.

[4] Naval Rule 3.6 states: "A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review thereof."

22. The Chief Prosecutor violated this ethical constraint when he spoke approvingly about the testimonial evidence that would be heard by former Army Sergeant Lane Morris.

Because of Its Dual Obligation to Serve Its Client and to Ensure Justice, the Prosecution is Subject to Special, More Restrictive Rules Regarding Pre-Trial Publicity and Extrajudicial Statements.

23. Unlike defense counsel, the prosecution does not merely serve its client. Rather, the prosecution bears a dual obligation, both as an advocate and as a guarantor of justice. With this added role comes added responsibility. As Justice Sutherland stated in *Berger v. United States:*

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935); *accord United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger)*.

24. In recognition of this special role that the prosecution plays and the additional power that attends that role, the rules of professional responsibility for most jurisdictions impose special ethical obligations on the prosecution that do not apply to the defense, including restrictions on extrajudicial comments. The rules of professional conduct for the Air Force, the Naval Service, the District of Columbia, and North Carolina,

all include a rule enumerated 3.8 exclusively concerned with the "special responsibilities" of prosecutors. Moreover, not only are there specific ethical rules that apply to prosecutors alone, but prosecutors may in some circumstances be required to refrain from some conduct ordinarily permissible under other rules. As stated in the comment to D.C. Rule 3.8, "Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance." *See* R.E. 54 at 6.

25. Caselaw has further recognized the important distinction that must be drawn between the prosecutorial and defense roles, and the greater latitude that is appropriately granted to defense counsel with regard to extrajudicial comments. As the Seventh Circuit Court of Appeals has noted, "Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales." *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242, 250 (7th Cir. 1975). Thus, the sheer weight of an indictment, and the power advantage that the prosecution enjoys, often necessitate that defense counsel speak publicly for his or her client.

26. The Supreme Court recognized exactly this point in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1990). There the Supreme Court noted that the adverse consequences of a criminal indictment include not only the potential for conviction and sentence, but significant reputational injury. The Court stated:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

501 U.S. at 1043; *accord United States v. McVeigh*, 931 F. Supp. 756, 758 (D. Colo. 1996). Because it is the defendant against whom an indictment is filed, the prosecution cannot claim the same need for extrajudicial speech, and neither the ethical rules nor the caselaw recognize such a claim.

Oral Argument

27. Oral argument on this motion is requested.

Attachments

The following documents are attached:

Exhibit A	Michelle Shephard, "T.O. teen 'indeed a terrorist,' U.S. insists, *Toronto Star*, Jan. 11, 2006
Exhibit B	Beth Gorham, "U.S. prosecutor in Khadr blasts sympathetic views of Canadian teen," *Brandon Sun*, Jan. 11, 2006
Exhibit C	Mercury News Services, "Canadian not innocent, prosecutor in U.S. argues," *Kitchener Record*, Jan. 11, 2006
Exhibit D	Sheldon Alberts, "Khadr trained killer, U.S. prosecutor says," *Star Phoenix*, Jan. 11, 2006
Exhibit E	Naval Rules of Professional Conduct

Exhibit F	Michelle Shephard, "Prosecutor calls teen a terrorist," *Guelph Mercury,* Jan. 11, 2006
Exhibit G	Additional articles from Canadian press
Exhibit H	Air Force Instruction 51-201

By: /s/

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law
[redacted]
Washington, DC 20016
[redacted]
Civilian Defense Counsel

JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

1/11/06 Toronto Star A01
2006 WLNR 556816

Toronto Star

January 11, 2006

Section: News

T.O. teen 'indeed a terrorist,' U.S. insists; Prosecutor says Khadr deserves life
Hearing begins today in Guantanamo

Michelle Shephard

GUANTANAMO , CUBA
Toronto Star
News

Calling Toronto-born Omar Khadr a terrorist and mocking news stories that describe him as a tortured teenager, the chief U.S. military prosecutor says he wants to see Canada's only detainee on this naval base locked up for life.

Khadr, 19, is expected to appear before a military commission today for a pre-trial hearing on a charge of murder, but a tough-talking Col. Morris Davis began his prosecution in front of reporters yesterday.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," Davis said. "It's my belief that the evidence will show he is indeed a terrorist."

Khadr faces life in prison if convicted of murder, a charge stemming from a July 2002 grenade attack in Afghanistan that killed U.S. 1st Class Sgt. Christopher Speer and injured Sgt. Layne Morris. Khadr was shot in the chest, stomach and eye before being captured by U.S. forces at the age of 15.

Davis said it was "sometimes nauseating" to read descriptions of Khadr in the media including those that described him as almost blind and near death when captured near Khost, Afghanistan.

"You'll see pictures of Mr. Khadr that look like he's almost dead but thanks to the American medics, who stepped over their dead friends and tended to Mr. Khadr, he's alive today," Davis said. He noted that Sgt. Morris is blind in one eye as a result of his injuries and had to retire from the military.

One of the allegations facing Khadr is that he attended an Al Qaeda training camp as a young teenager.

Yesterday, Davis quipped "These guys went to camp and you know they weren't making s'mores or learning how to tie knots. They were learning how to make bombs and kill Americans."

Khadr's hearing was originally set to begin yesterday but was postponed out of respect for the Muslim holiday of Eid Al Adha.

"Normally, Mr. Khadr and his family spent Eid with the Osama bin Laden family, so I'm sure he's upset he's here and not in Afghanistan with Osama bin Laden. He's a terrorist," Davis added at the end of his statement to reporters representing 14 international media organizations.

Khadr is the second youngest son of Ahmed Said Khadr, a reputed Canadian Al Qaeda financier and close associate with bin Laden. He was killed in October 2003 by Pakistani forces.

Davis also countered criticism of the tribunal process itself, in which the military serves as both prosecutor and judge. Civil rights and defence lawyers, as well as some foreign governments such as Britain, have argued the proceedings are unconstitutional and want the detainees tried in U.S. criminal courts.

"Some say we're making up the rules as we go along but the law has to adapt to today's environment," Davis told reporters, saying Al Qaeda is unlike any "enemy faced before."

"We've got nothing to be ashamed of in what we're doing here. So we want you, we want the public, we want the world to see that we're extending a full, fair and open trial to the terrorists that have attacked us. We're extending rights to them that they have never contemplated."

From the moment that you land at the U.S. naval base camp in Cuba, it's obvious that there's a concerted effort underway to refute claims of mistreatment and torture at the camp. Tours for journalists and other visitors always include a visit to Camp X-Ray, where four years ago today, the first terrorism suspects were detained. The outdoor wire cages that resemble kennels are now overgrown with vines and the only occupants are a family of local banana rats.

This is where photos were taken of kneeling, shackled detainees in blacked-out goggles and others being wheeled on gurneys to interrogation rooms. The photos sparked an outcry from human rights groups. Maj. Jeffrey Weir is quick to point out that some rights groups and media outlets still use these images to portray Guantanamo when it hasn't been used since April 2002.

Detainees are now kept at a centre known as Camp Delta, cut off from the rest of the base by hills of inhospitable terrain littered with cacti.

Built on a stunning coastline - one detainees don't see through the mesh covering the fence - the detention centre consists of four inner camps with varying degrees of security.

Camps 3 and 4 are used for what's known as "non-compliant" prisoners, those clad in orange and closely monitored. On a visit yesterday, one such detainee could be seen using a walker with guards walking with him on either side.

There's a small fenced-in recreation area where an arrow points to Mecca and gives the distance as 12,793 kilometres. In the cells, Qur'ans hang in surgical masks, so, as Cmdr. Catie Hanft explains, "we're aware where it is so we don't touch it."

Hanft has been at the base for four months and is in charge of all the guards inside the gate who promptly salute her and say "honour bound," as she passes.

A 42-year-old New Yorker, with green eyes and red hair, Hanft has acquired the name of "Red Hammer 1" since coming to the camp because she's known for her strict enforcement of the rules. She's personally hurt, she says, by allegations of torture of detainees in her custody.

"This does bother me because I know the sailors and soldiers here and I know they don't do the things people say they're doing."

Camp 4 is the only communal living space, where detainees are permitted to live in rooms with nine others and there's a common area where food is brought on metal picnic tables. They're all dressed in white and most have long beards and appear tired of the media attention and retreat into their rooms when cameras appear.

It's unlikely Khadr has ever been kept here. According to his Washington-based lawyer Muneer Ahmad, who visited him yesterday, he has been kept almost entirely in segregation, at a detention facility known as Camp 5, outside of Camp Delta.

As for Khadr's allegations of torture that the soldiers here refute, Ahmad said yesterday he has "credible evidence."

MICHELLE SHEPHARD TORONTO STAR Lt.-Col. Jeremy Martin waits for the security gates to be opened outside Camp Delta 2 and 3 at the U.S. military detention centre in Guantanamo Bay, Cuba, yesterday. Canadian Omar Khadr, 19, is being held at the naval base and will face a pre-trial hearing today.

---- INDEX REFERENCES ----

NEWS SUBJECT: (International Terrorism (1IN37))

REGION: (Afghanistan (1AF45); Cuba (1CU43); USA (1US73); Americas (1AM92); North America (1NO39); Canada (1CA33); Caribbean (1CA06); Western Asia (1WE54); Asia (1AS61); Latin America (1LA15))

Language: EN

OTHER INDEXING: (AL QAEDA; CANADIAN AL QAEDA; CANADIAN OMAR KHADR; PROSECUTOR) (Ahmad; Ahmed; Al Adha; Al Qaeda; Built; Catie Hanft; Christopher Speer; Civil; Davis; Hanft; Jeffrey Weir; Jeremy Martin; Khadr; Layne Morris; Morris; Morris Davis; Muneer Ahmad; Omar; Omar Khadr; Qur; T.O. teen)

EDITION: MET

Word Count: 1265
1/11/06 TRNTST A01

END OF DOCUMENT

Exhibit B

BRANDON SUN

Wednesday, January 11th, 2006

U.S. prosecutor in Khadr case blasts sympathetic views of Canadian teen

By: Beth Gorham

Email Story Printer Friendly Version

GUANTANAMO BAY, Cuba — The U.S. military lawyer prosecuting Omar Khadr said Tuesday the Canadian teenager is no fresh-faced innocent who was making s'mores at al-Qaida training camps, but a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of detainees like Khadr, who was 15 when he was captured after a July 2002 firefight.

Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said, breaking his silence on the case a day before the teen's first appearance at a pre-trial hearing that his lawyers tried in vain to stop.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that Khadr and others picked up the tools of terrorism from al-Qaida.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots."

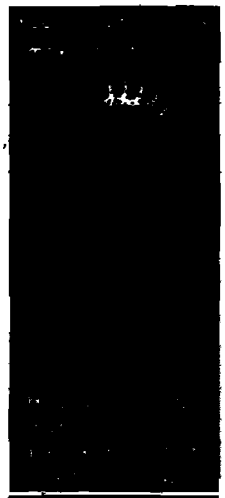
Khadr, now 19, is expected to enter a plea Wednesday in a contentious tribunal that's proceeding despite motions filed by his defence lawyers and a pending decision by the U.S. Supreme Court on whether the system for foreign terror suspects is constitutional.

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, Khadr is charged with murder and other counts arising from the death of medic Christopher Speer and has been held here at the U.S. military detention centre in Guantanamo Bay for the last 39 months.

Few have been allowed to see Khadr, who is nearly blind in one eye and has spent most of his time in isolation at Camp Delta, a barbed-wire enclave on the U.S.-controlled southeast coast of Cuba, near the historic naval base.

One of his American lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that the U.S. military is prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence" that Khadr has been tortured.

And he called on Canada to denounce the tribunal system set up by President George W. Bush, saying it allows confessions extracted by torture and doesn't afford anywhere near the kind of due process of criminal civil trials.



"Canada has a decision to make," said Ahmad, "either to publicly condemn the military commissions as fundamentally unfair ... or to remain silent on the matter and complicit in the sham trial."

It was unclear whether Khadr's Canadian lawyer, Dennis Edney, would attend the hearing.

Ahmad, who saw Khadr on Monday, said he suffers from chronic health problems and has participated in hunger strikes but is in "reasonably good spirits given what he's been subjected to."

1/11/06 Kitchener-Waterloo Rec. A6
2006 WLNR 565382

Kitchener Record

January 11, 2006

Section: FRONT

Canadian not innocent, prosecutor in U.S. argues

GUANTANAMO BAY, CUBA
Mercury news services
FRONT

The U.S. military lawyer prosecuting Omar Khadr said yesterday that the Canadian teenager is no fresh-faced innocent but a terrorist murderer who deserves to be convicted by a special military tribunal.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of Khadr, who was 15 when he was captured after a July 2002 firefight in Afghanistan that killed a U.S. medic. Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said in comments the day before the teen's first appearance at a pre-trial hearing.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that Khadr and others picked up the tools of terrorism at al-Qaida training camps.

"They weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea in a pre-trial hearing today that's going ahead despite attempts by his defence lawyers to stop it and a pending decision by the Supreme Court on whether the military tribunals are constitutional.

A member of the Toronto family with alleged ties to Osama bin Laden, Khadr is charged with murder and other counts arising from the death of the medic and has been held here at the U.S. military detention centre in Guantanamo Bay.

One of his U.S. lawyers, Muneer Ahmad, called it "astounding, shameful and appalling'' that Americans are prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence'' that Khadr has been tortured over his last 39 months in Guantanamo.

And he called on Canada to denounce the tribunal system set up by U.S. President George W. Bush, saying it allows confessions extracted by torture and doesn't afford anywhere near the kind of due process of criminal civil trials.

"Canada has a decision to make,'' said Ahmad, "either to publicly condemn the military commissions as fundamentally unfair . . . or to remain silent on the matter and complicit in the sham trial.''

Davis vigorously defended the system for terrorism suspects captured in the Afghanistan war, saying "we've got nothing to be ashamed of.''

"We want the world to see that we're extending a full, fair and open trial to the terrorists that have attacked us. We're extending rights to them that they've never contemplated.''

The Khadr family has provoked intense debate in Canada.

Each of the five Khadr siblings, all of whom are Canadian citizens, has at one time or another been separately accused or investigated for alleged links to terrorism.

Their father, Egyptian-born Canadian Ahmed Said Khadr, was an accused al-Qaida financier killed in a battle with Pakistani forces in 2003.

Yesterday, the day before Omar was to make appear at the pretrial military hearing in Guantanamo Bay, his older brother, Abdullah, made a brief court appearance in Toronto.

The 24-year-old was arrested Dec. 17 in Toronto on a provisional arrest warrant issued south of the border, where he is wanted for allegedly plotting to kill Americans abroad. He was remanded back into custody pending an extradition hearing and was ordered to return to court Feb. 2.

Crown lawyer Robin Parker said yesterday the United States has 60 days from the date of arrest to formally request Abdullah's extradition. Canada's justice minister would then have 30 days to decide whether to agree.

Photo: TORONTO STAR/CANADIAN PRESS / Fatmah Elsamnah Khadr (above left) and Maha Elsamnah Khadr, mother of alleged terrorists Omar and Abdullah Khadr, leave Ontario Superior Court in Toronto yesterday after an extradition hearing for Abdullah was put over until Feb. 2. Omar Khadr, 19 (photo at left), will make his first appearance in a pre-trial hearing today in Guantanamo Bay, Cuba.; Photo: OMAR KHADR

---- INDEX REFERENCES ----

NEWS SUBJECT: (Violent Crime (lVI27); Crime (lCR87); Legal (lLE33); International

Terrorism (1IN37); Social Issues (1SO05); Criminal Law (1CR79))

REGION: (Afghanistan (1AF45); Cuba (1CU43); USA (1US73); Americas (1AM92); North America (1NO39); Canada (1CA33); Caribbean (1CA06); Western Asia (1WE54); Asia (1AS61); Latin America (1LA15))

Language: EN

OTHER INDEXING: (CANADIAN; CANADIAN AHMED; KHADR; ONTARIO SUPERIOR COURT; PHOTO; PHOTO: OMAR; SUPREME COURT) (2.; Abdullah; Abdullah Khadr; Ahmad; Crown; Davis; George W. Bush; Khadr; Maha Elsamnah Khadr; Mercury; Moe Davis; Muneer Ahmad; Omar; Omar Khadr; Robin Parker)

EDITION: Final

Word Count: 793
1/11/06 KITCHWATERLOO A6

END OF DOCUMENT

EXHIBIT D

Khadr trained killer, U.S. prosecutor says The Star Phoenix (Saskatoon, Saskatchewan) January 11, 2006 Wednesday

The Star Phoenix (Saskatoon, Saskatchewan)

January 11, 2006 Wednesday
Final Edition

SECTION: WORLD; Pg. D7

LENGTH: 463 words

HEADLINE: Khadr trained killer, U.S. prosecutor says

BYLINE: Sheldon Alberts, CanWest News Service

DATELINE: U.S. NAVAL BASE, GUANTANAMO BAY, Cuba

BODY:

U.S. NAVAL BASE, GUANTANAMO BAY, Cuba -- Omar Khadr is a committed killer who built bombs and likely prays daily to return to Osama bin Laden's inner circle, says the chief U.S. prosecutor in the murder case against him.

In a rare appearance before the international media Tuesday, air force Col. Morris Davis called sympathetic portrayals of Khadr by defence lawyers "nauseating" and suggested the 19-year-old has fabricated claims of torture at the hands of his American interrogators.

"We'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," Morris said on the eve of a planned pre-trial hearing here for Khadr before a special U.S. military commission.

"It isn't a great leap to figure out why we are holding him accountable."

Khadr, who faces charges of murder by an unprivileged belligerent, has been detained in open-air, ventilated cells at the maximum-security Camp Delta here since October 2002.

On the eve of today's hearing, Khadr was fed a special meal of halal-appropriate beef kabobs, Arab rice and spicy chicken to mark Eid ul-Adha, the Feast of the Sacrifice, one of the holiest days of the year for Muslims.

"Normally, Mr. Khadr and his family spend Eid with the Osama bin Laden family," remarked Morris. "I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden."

Khadr was captured by American forces in July 2002 after allegedly throwing a grenade that killed Special Forces medic Christopher Speer in a battle near Khost in southeastern Afghanistan.

Formally charged last November, **Khadr's** case has been swept up in controversy and legal challenges over the legitimacy of the military tribunals established by U.S. President George W. Bush to try alleged terrorists seized after Sept. 11, 2001.

According to the military's charge sheet, **Khadr** received one month of "one-on-one" private terrorist training at an Afghan camp in June 2002. The training had been arranged by his later father, Ahmad Said **Khadr**, a high-ranking al-Qaida financier, the military says.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots," said Morris.

Khadr's civilian lawyer, American University Prof. Muneer Ahmad, cast today's military commission as a kangaroo court that's rigged to secure a guilty verdict.

Meanwhile, **Khadr's** 24-year-old brother, Abdullah **Khadr**, had an extradition hearing in Toronto Tuesday.

Khadr, held in Pakistan for more than a year, was arrested in Toronto last month after the U.S. Department of Justice asked Canadian authorities to detain him on charges he bought weapons, ammunition and explosives for a senior al-Qaida figure. The arms were allegedly used to attack coalition troops in Afghanistan.

Khadr's case was put off until Feb. 2.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:18 PM EST

Exhibit B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO

JAGINST 5803.1C
JAG 132

9 Nov 04

JAG INSTRUCTION 5803.1C

From: Judge Advocate General

Subj: PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL

Ref: (a) Uniform Code of Military Justice (UCMJ)
(b) Manual for Courts-Martial, United States (MCM)
(c) 10 U.S.C. § 1044
(d) SECNAVINST 5430.27 (series)
(e) U.S. Navy Regulations
(f) American Bar Association Code of Judicial Conduct
(g) SECNAVINST 5211.5 (series)
(h) SECNAVINST 5212.5 (series)

Encl: (1) Rules of Professional Conduct
(2) Complaint Processing Procedures
(3) Outside Practice of Law by Covered USG Attorneys
(4) Relations With Non-USG Counsel

1. Purpose. In furtherance of references (a) through (f), which require the Judge Advocate General of the Navy (JAG) to supervise the performance of legal services under JAG cognizance throughout the Department of the Navy (DON), this instruction is promulgated:

a. to establish Rules of Professional Conduct (the Rules) for attorneys subject to this instruction;

b. to establish procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of JAG, whether arising from professional legal activities in DON proceedings and matters, or arising from other, non-U.S. Government related professional legal activities or personal misconduct which suggests the attorney is ethically, professionally, or morally unqualified to perform legal services within the DON;

c. to prescribe limitations on, and procedures for processing requests to engage in, the outside practice of law by those DON attorneys practicing under the supervision of JAG; and

RULES OF PROFESSIONAL CONDUCT

PREAMBLE

A covered attorney is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the Department of the Navy and to individual clients. These Rules of Professional Conduct (Rules) govern the ethical conduct of covered attorneys practicing under the Uniform Code of Military Justice, the Manual for Courts-Martial, 10 U.S.C. § 1044 (Legal Assistance), other laws of the United States, and regulations of the Department of the Navy.

The Rules not only address the professional conduct of judge advocates, but also apply to all other covered attorneys who practice under the cognizance and supervision of the Judge Advocate General of the Navy.

The comments accompanying each rule explain and illustrate the meaning and purpose of the rule. The comments are intended as guides to interpretation, but the text of each rule, printed in boldface, is authoritative. All covered attorneys are subject to professional disciplinary action, as outlined in this instruction, for violation of the Rules. Action on allegations of professional or personal misconduct undertaken per these Rules does not prevent other Federal, state, or local bar associations, or other licensing authorities, from taking professional disciplinary or other administrative action for the same or similar conduct.

c. CROSS REFERENCES:

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 3.3 Candor and Obligations Toward the Tribunal
(3) Rule 3.4 Fairness to Opposing Party and Counsel

6. RULE 3.6 EXTRA-TRIBUNAL STATEMENTS

a. A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

b. A statement referred to in paragraph a ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any forensic examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of

materially prejudicing an impartial proceeding;

(6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.

c. Notwithstanding paragraphs a and b(1) through (7), a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim, offense, or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, duty station, occupation, and family status of the accused;

(b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(c) the fact, time, and place of apprehension; and

(d) the identity of investigating and apprehending officers or agencies and the length of the investigation.

d. Notwithstanding paragraphs a and b(1) through (7), a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the

substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

e. The protection and release of information in matters pertaining to the Department of the Navy is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

f. COMMENT

(1) It is difficult to strike a balance between protecting the right to a fair trial or proceeding and safeguarding the right of free expression. Preserving the right to a fair proceeding necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly when trial by jury or members is involved. If there were no such limits, the result would be the practical nullification of the protective effects of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

(2) No body of rules can simultaneously satisfy all interests of fair proceedings and all those of free expression. The formula in this rule is based upon the ABA Model Rules of Professional Conduct and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

(3) Paragraph a provides the general prohibition against release of extrajudicial statements that are reasonably known to carry the substantial likelihood of material prejudice. Paragraph b contains a non-exclusive list of subjects that presumptively result in material prejudice and must be considered specifically prohibited absent unique or compelling circumstances. Paragraph c identifies a non-exclusive list of

specific matters about which a covered attorney's statement would not ordinarily be considered to present a substantial likelihood of material prejudice and should not, in most instances, be considered prohibited by paragraph a.

(4) Extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable covered attorney would believe a public response is required in order to avoid prejudice to the covered attorney's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

(5) Paragraph e acknowledges that a covered attorney's release of information is governed not only by this Rule but also by Federal statutes and regulations. Prior to releasing any information, a covered attorney should consult the appropriate statute, directive, regulation, or policy guideline.

g. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.4 Fairness to Opposing Party and Counsel
(3) Rule 3.5 Impartiality and Decorum of the Tribunal
(4) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel

7. RULE 3.7 ATTORNEY AS WITNESS

a. A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and quality of legal services rendered in the case; or

(3) disqualification of the covered attorney would work substantial hardship on the client.

b. A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely

primarily the responsibility of the covered attorney involved. See Rule 1.7 Comment.

d. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.9 Conflict of Interest: Former Client
(4) Rule 3.4 Fairness to Opposing Party and Counsel

8. RULE 3.8 SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL AND OTHER GOVERNMENT COUNSEL

a. A trial counsel shall:

(1) recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;

(2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under Rule 3.6; and

(6) except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

b. Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to, land-line telephone conversations, facsimile transmissions, U.S. mail, and E-Mail. Trial Counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.

c. COMMENT

(1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ; see also R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph a(1) recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See United States v. Howe, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also Rule 3.3d (governing ex parte proceedings). Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

(2) Paragraph a(3) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph a(4) recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result

in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph a(5) in a number of ways. These include personally informing others of the trial counsel's obligations under Rule 3.7, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph a(6) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a trial counsel may make which comply with Rule 3.6.

(6) The "ABA Standards for Criminal Justice: The Prosecution Function," (3rd ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See United States v. Howe, 37 M.J. 1062 (NMCRS 1993); United States v. Dancy, 38 M.J. 1 (CMA 1993); United States v. Hamilton, 41 M.J. 22 (CMA 1994); United States v. Meek, 44 M.J. 1 (CMA 1996).

(7) The reference to "other government counsel" in the title to this rule pertains only to paragraph b. That paragraph should apply not only to trial counsel, but also to other government counsel (*i.e.*, staff judge advocates, their assistants or deputies, and command services attorneys).

(8) The responsibilities of trial counsel and other government counsel, set out in paragraph b., are consistent with Rule 4.4 (Respect for Rights of Third Persons). The last sentence of paragraph b, addressing trial counsel or other government counsel responsibility for actions of his or her agents or representatives, is consistent with the standard set out in paragraph a(1) of Rule 8.4 (Misconduct).

d. CROSS REFERENCES

(1) Rule 3.1 Meritorious Claims and Contentions
(2) Rule 3.3 Candor and Obligations Toward the Tribunal
(3) Rule 3.4 Fairness to Opposing Party and Counsel

Enclosure (1)

EXHIBIT F

Prosecutor calls teen a terrorist; U.S. military prosecutor in Khadr case blasts sympathetic view of Canadian youth Guelph Mercury (Ontario, Canada) January 11, 2006 Wednesday

Guelph Mercury (Ontario, Canada)

January 11, 2006 Wednesday
Final Edition

SECTION: NEWS; Pg. A9

LENGTH: 989 words

HEADLINE: Prosecutor calls teen a terrorist; U.S. military prosecutor in **Khadr** case blasts sympathetic view of Canadian youth

BYLINE: MICHELLE SHEPHARD, Toronto Star

DATELINE: GUANTANAMO, CUBA

BODY:

Calling Toronto-born Omar **Khadr** a terrorist, and mocking news stories that describe him as a tortured teenager, the chief U.S. military prosecutor wants to see Canada's only detainee on this naval base locked up for life.

Khadr, 19, is expected to appear before a military commission today for a pre-trial hearing on a charge of murder, but a tough-talking Col. Morris Davis began his prosecution in front of reporters yesterday.

"You'll see evidence when we get into the court room of the smiling face of Omar **Khadr** as he builds bombs to kill Americans," Davis said. "It's my belief that the evidence will show he is indeed a terrorist."

Khadr faces life in prison if convicted of murder, a charge stemming from a July 2002 grenade attack in Afghanistan that killed U.S. 1st Class Sgt. Christopher Speer and injured Sgt. Layne Morris. **Khadr** was shot in the chest, stomach and eye before being captured by U.S. forces at the age of 15.

Davis said it was "sometimes nauseating," to read descriptions of **Khadr** in the media including those that describe him as almost blind and near death when captured near Khost, Afghanistan.

"You'll see pictures of Mr. **Khadr** that looks like he's almost dead but thanks to the American medics, who stepped over their dead friends and tended to Mr. **Khadr**, he's alive today," Davis said, noting that Morris is not "almost blind," but indeed blind in one eye and had to retire from the military.

One of the allegations facing **Khadr** is that he attended an al-Qaida training camp as a young teenager. Yesterday Davis quipped: "These guys went to camp and you know they weren't making s'mores or learning how to tie knots. They were learning how to make bombs and kill Americans."

Khadr's hearing was originally set to begin yesterday but was postponed out of respect for the Muslim holiday of Eid Al Adha.

"Normally, Mr. **Khadr** and his family spent Eid with the Osama bin Laden family so I'm sure he's upset he's here and not in Afghanistan with Osama bin Laden. He's a terrorist," Davis added at the end of his statement to reporters representing 14 international media organizations.

Khadr is the second youngest son of Ahmed Said **Khadr**, a reputed Canadian al-Qaida financier and close associate with bin Laden. He was killed in October 2003 by Pakistani forces.

Davis also countered criticism of the tribunal process itself, in which the military serves as both prosecutor and judge. Civil rights and defence lawyers, as well as some foreign governments such as Britain, have argued that the proceedings are unconstitutional and want the detainees tried in U.S. criminal courts.

"Some say we're making up the rules as we go along but the law has to adapt to today's environment," Davis told reporters, saying al-Qaida is unlike any "enemy faced before."

"We've got nothing to be ashamed of in what we're doing here. So we want you, we want the public, we want the world to see that we're extending a full, fair and open trial to the terrorists that have attacked us. We're extending rights to them that they have never contemplated."

From the moment that you land at the naval base camp, it's obvious that there's a concerted effort underway to refute claims of mistreatment and torture at the camp. Tours for journalists and other visitors always now include a visit to Camp X-Ray, where four years ago today, the first terrorism suspects were detained. The outdoor wire cages that resemble kennels are now overgrown with vines and the only occupants are a family of local banana rats.

This is where those first pictures of kneeling, shackled detainees in blacked-out goggles and others being wheeled on gurneys to interrogations rooms were first taken. Major Jeffrey Weir is quick to point out that some human rights groups and media outlets still use these images to portray Guantanamo when it hasn't been used since April 2002.

Where detainees are kept now is a centre known as Camp Delta, cut off from the rest of the base by hills of inhospitable terrain littered with cactus.

Built on a stunning coastline ô one detainees don't see through the mesh covering the fence -- the detention centre consists of four inner camps with varying security. Camps three and four are used for what's known as "non-compliant" prisoners, those clad in orange and closely monitored. On a visit yesterday one such detainee could be seen using a walker with a guard walking with him on either side.

There's a small fenced in recreation area where an arrow points to Mecca and gives the distance as 12,793 kilometres. In the cells there are Qu'ran's hanging in surgical masks, so, as Commander Catie Hanft explains, "we're aware where it is so we don't touch it."

Hanft has been at the base for four months and is in charge of all the guards inside the gate

who promptly salute her and say "honour bound," as she passes.

A 42-year-old New Yorker, with expressive green eyes and red hair, Hanft has acquired the name of 'Red Hammer 1' since coming to the camp because she's known for her strict enforcement of the rules.

She's personally hurt she says by allegations of torture of detainees in her custody. "This does bother me because I know the sailors and soldiers here and I know they don't do the things people say they're doing."

Camp four is the only communal living space, where detainees are permitted to live in rooms with nine others and there's a common area where food is brought on metal picnic tables. They're all dressed in white and most have long beards and appear tired of the media attention and retreat into their rooms when cameras appear.

It's unlikely **Khadr** has ever been kept here. According to his Washington-based lawyer Muneer Ahmad, who visited with him just yesterday, he has been kept almost entirely in segregation, which means at a detention facility known as Camp 5, outside of Camp Delta.

As for **Khadr's** allegations of torture that the soldier here refute, Ahmad said yesterday that he has "credible evidence."

GRAPHIC: Photo: CANADIAN PRESS , Omar **Khadr**, seen in a handout photo taken before 2002, is to make his first public appearance in a special military court in Guantanamo, Cuba, today.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:13 PM EST

Exhibit 6

KHADR FACES ANGRY COLONEL; ARMY LAWYER DENOUNCES TEEN Calgary Sun (Alberta) January 11, 2006 Wednesday

January 11, 2006 Wednesday
FINAL EDITION

SECTION: NEWS; Pg. 22

LENGTH: 240 words

HEADLINE: KHADR FACES ANGRY COLONEL;
ARMY LAWYER DENOUNCES TEEN

BYLINE: BY CP

DATELINE: GUANTANAMO BAY, Cuba

BODY:

The U.S. military lawyer prosecuting Omar Khadr said yesterday the Canadian teenager is no fresh-faced innocent but a terrorist murderer.

Col. Moe Davis blasted "nauseating" sympathetic portrayals of Khadr, 15 years old when captured after a July 2002 firefight in Afghanistan that killed a U.S. medic.

Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said the day before the teen's first appearance at a pre-trial hearing.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis.

"They weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea in a pre-trial hearing today that's going ahead despite attempts by his lawyers to stop it and a pending decision by the Supreme Court on whether the tribunals are constitutional.

Meanwhile, Khadr's brother, Abdullah Khadr made a brief court appearance in Toronto yesterday and was remanded back into custody pending an extradition hearing.

The 24-year-old was arrested Dec. 17.

The U.S. wants to try Khadr on charges that include conspiracy to murder U.S. citizens.

An RCMP affidavit alleges **Khadr** bought weapons for al-Qaida to use against Americans in Afghanistan, and admitted to taking part in a plan to assassinate Pakistan's prime minister.

GRAPHIC: photo of OMAR **KHADR**

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:07 PM EST

U.S. LAWYER RIPS INTO KHADR Edmonton Sun (Alberta) January 11, 2006 Wednesday

Edmonton Sun (Alberta)

January 11, 2006 Wednesday
FINAL EDITION

SECTION: NEWS; Pg. 24

LENGTH: 386 words

HEADLINE: U.S. LAWYER RIPS INTO KHADR

BYLINE: BY CP

DATELINE: GUANTANAMO BAY, Cuba

BODY:

The U.S. military lawyer prosecuting Omar Khadr said yesterday that the Canadian teenager is no fresh-faced innocent but a terrorist murderer who deserves to be convicted by a special military tribunal.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of Khadr, who was 15 when he was captured after a July 2002 firefight in Afghanistan that killed a U.S. medic. Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said in comments the day before the teen's first appearance at a pre-trial hearing.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said. "I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that Khadr and others picked up the tools of terrorism at al-Qaida training camps.

"They weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea in a pre-trial hearing today that's going ahead despite attempts by his defence lawyers to stop it and a pending decision by the Supreme Court on whether the military tribunals are constitutional.

A member of the Toronto family with alleged ties to Osama bin Laden, Khadr is charged with murder and other counts arising from the death of the medic and has been held at the U.S. military detention centre in Guantanamo Bay.

One of his U.S. lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that Americans are prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence" that Khadr has been tortured over his last 39 months in Guantanamo.

And he called on Canada to denounce the tribunal system set up by President George W. Bush, saying it allows confessions extracted by torture and doesn't afford anywhere near the kind of due process of criminal civil trials.

"Canada has a decision to make," said Ahmad, "either to publicly condemn the military commissions as fundamentally unfair ... or to remain silent on the matter and complicit in the sham trial."

The Khadr family has provoked intense debate in Canada.

Each of the five Khadr siblings, all of whom are Canadian citizens, has at one time or another been separately accused of, or investigated for, possible links to terrorism.

GRAPHIC: photo of OMAR **KHADR** Charged with murder

LOAD-DATE: January 11, 2006

Teenage Khadr a smiling killer, says prosecutor: Claims of prison torture denied The Calgary Herald (Alberta) January 11, 2006 Wednesday

The Calgary Herald (Alberta)

January 11, 2006 Wednesday
Final Edition

SECTION: NEWS; Pg. A8

LENGTH: 436 words

HEADLINE: Teenage Khadr a smiling killer, says prosecutor: Claims of prison torture denied

BYLINE: Sheldon Alberts, CanWest News Service; with a file from The Canadian Press

DATELINE: U.S. NAVAL BASE, GUANTANAMO BAY, Cuba

BODY:

Omar Khadr is a committed killer who built bombs and likely prays daily to return to Osama bin Laden's inner circle, says the chief U.S. prosecutor in the murder case against him.

In a rare appearance before the international media Tuesday, air force Col. Morris Davis called sympathetic portrayals of Khadr by defence lawyers "nauseating" and suggested the 19-year-old has fabricated claims of torture at the hands of his American interrogators.

"We'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," Davis said on the eve of a planned pretrial hearing here for Khadr before a special U.S. military commission. "It isn't a great leap to figure out why we are holding him accountable."

Khadr, who faces charges of murder by an unprivileged belligerent (someone who isn't a member of a regular army), has been detained in open-air cells at the maximum-security Camp Delta here since October 2002.

On the eve of today's hearing, Khadr was fed a special meal of halal-appropriate beef kabobs, Arab rice and spicy chicken to mark Eid ul-Adha, the Feast of the Sacrifice, one of the holiest days of the year for Muslims.

"Normally, Mr. Khadr and his family spend Eid with the Osama bin Laden family," remarked Davis. "I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden."

Khadr was captured by American forces in July 2002 after allegedly throwing a grenade that killed Special Forces medic Christopher Speer in a battle near Khost in southeastern Afghanistan.

Formally charged last November, **Khadr's** case has been swept up in controversy and legal challenges over the legitimacy of the military tribunals established by U.S. President George W. Bush to try alleged terrorists seized after Sept. 11, 2001.

According to the military's charge sheet, **Khadr** received one month of "one-on-one" private terrorist training at an Afghan camp in June 2002. The training had been arranged by his late father, Ahmad Said **Khadr**, a high-ranking al-Qaeda financier, the military says.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots," said Morris.

Khadr's civilian lawyer, American University Prof. Muneer Ahmad, cast today's military commission as a kangaroo court that's rigged to secure a guilty verdict against the Toronto-born man.

Meanwhile, **Khadr's** older brother Abdullah, wanted in the U.S. for allegedly plotting to kill Americans abroad, has been told to return to court in Toronto on Feb. 2. He made a brief court appearance Tuesday and was remanded back into custody pending an extradition hearing.

GRAPHIC:
Photo: Herald Archive, Canadian Press; Omar **Khadr** faces a pretrial hearing today over murder charges.;
Photo: Abdullah **Khadr**

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:09 PM EST

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

Khadr portrayals 'nauseating' -- prosecutor Times Colonist (Victoria, British Columbia) January 11, 2006 Wednesday

Times Colonist (Victoria, British Columbia)

January 11, 2006 Wednesday
Final Edition

SECTION: NEWS; Pg. A8

LENGTH: 297 words

HEADLINE: Khadr portrayals 'nauseating' -- prosecutor

BYLINE: Sheldon Alberts, CanWest News Service

DATELINE: U.S. NAVAL BASE, GUANTANAMO BAY, Cuba

BODY:

U.S. NAVAL BASE, GUANTANAMO BAY, Cuba -- Canadian teenager Omar Khadr is a committed killer who built bombs and likely prays daily to return to Osama bin Laden's inner circle, says the chief U.S. prosecutor in the murder case against him.

In a rare appearance before the international media Tuesday, air force Col. Morris Davis called sympathetic portrayals of Khadr by defence lawyers "nauseating" and suggested the 19-year-old has fabricated claims of torture at the hands of his American interrogators.

"We'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," Morris said on the eve of a planned pre-trial hearing here for Khadr before a special U.S. military commission.

"It isn't a great leap to figure out why we are holding him accountable."

Khadr, who faces charges of murder by an unprivileged belligerent, has been detained in open-air, ventilated cells at the maximum-security Camp Delta here since October 2002.

On the eve of today's hearing, Khadr was fed a special meal of halal-appropriate beef kabobs, Arab rice and spicy chicken to mark Eid ul-Adha, the Feast of the Sacrifice, one of the holiest days of the year for Muslims.

"Normally, Mr. Khadr and his family spend Eid with the Osama bin Laden family," remarked Morris. "I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden."

Khadr was captured by American forces in July 2002 after allegedly throwing a grenade that killed special forces medic Christopher Speer in a battle near Khost in southeastern Afghanistan.

Khadr's case has been swept up in controversy and legal challenges over the legitimacy of the military tribunals established by U.S. President George W. Bush to try alleged terrorists seized after Sept. 11, 2001.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:19 PM EST

Tough talk against Khadr; Terror suspect deserves to be convicted by tribunal: prosecutor
The Hamilton Spectator (Ontario, Canada) January 11, 2006 Wednesday

The Hamilton Spectator (Ontario, Canada)

January 11, 2006 Wednesday
Final Edition

SECTION: CANADA/WORLD; Pg. A10

LENGTH: 546 words

HEADLINE: Tough talk against Khadr; Terror suspect deserves to be convicted by tribunal: prosecutor

BYLINE: Beth Gorham, The Canadian Press

DATELINE: GUANTANAMO BAY, CUBA

BODY:

The U.S. military lawyer prosecuting Omar Khadr says the Canadian teenager is no fresh-faced innocent who was toasting marshmallows at al-Qaeda training camps.

He's a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic, said chief prosecutor Colonel Morris Davis.

Blasting "nauseating" sympathetic portrayals of detainees like Khadr, who was 15 when he was captured after a July 2002 firefight, Davis said authorities could have sought the death penalty but didn't because Khadr was a juvenile.

The prosecutor made the remarks yesterday, a day before the teen's first appearance at a pre-trial hearing that his lawyers tried in vain to stop. Khadr, now 19, is expected to enter a plea today in a contentious tribunal that's proceeding despite motions filed by his defence lawyers and a pending decision by the U.S. Supreme Court on whether the system for foreign terror suspects is constitutional.

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, Khadr is charged with murder and other counts arising from the death of medic Christopher Speer and has been held at the U.S. military detention centre in Guantanamo Bay for the last 39 months.

An older brother, Abdullah Khadr, 24, was remanded in custody at a court hearing in Toronto yesterday. He faces possible extradition after the United States levelled terrorism charges against him late last year.

Few have been allowed to see the teenage Khadr, who is nearly blind in one eye and has

spent most of his time in isolation at Camp Delta, a barbed-wire enclave on the U.S.-controlled southeast coast of Cuba, near the historic naval base.

One of his American lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that the U.S. military is prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence" that **Khadr** has been tortured.

And he called on Canada to denounce the tribunal system set up by President George W. Bush, saying it allows confessions extracted by torture and doesn't afford anywhere near the kind of due process of criminal civil trials. Only nine detainees at Guantanamo have been formally charged with war crimes and three of the tribunals have been stayed pending the Supreme Court decision, expected by June.

There are a couple dozen other cases in the works, said Davis, with charges expected in the coming months. Some will likely be completely open, but others will be restricted in parts for security reasons.

Khadr will be formally represented by Captain John Merriam, a U.S. army judge advocate with no trial experience, "even on charges of jaywalking," said Ahmad, who is asking that he be replaced by someone with more experience. It was unclear whether **Khadr's** Canadian lawyer, Dennis Edney, would attend today's hearing.

U.S. authorities say **Khadr** threw a grenade that killed Speer in an alleged al-Qaeda compound. The teen was shot three times by American soldiers.

"Thanks to the American medics who stepped over their dead friend and tended to Mr. **Khadr**, he's alive today," said Davis.

Khadr was formally charged last November with murder, attempted murder, aiding the enemy and conspiracy. He's been designated an "unprivileged belligerent" who didn't have the right to wage war.

GRAPHIC: Photo: Omar **Khadr**, 19, to enter plea today.; Photo: Abdullah **Khadr**, 24, in custody in Toronto.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:16 PM EST

CANUCK DETAINEE NO INNOCENT, LAWYER SAYS The Ottawa Sun January 11, 2006 Wednesday

The Ottawa Sun

January 11, 2006 Wednesday
FINAL EDITION

SECTION: NEWS; Pg. 18

LENGTH: 160 words

HEADLINE: CANUCK DETAINEE NO INNOCENT, LAWYER SAYS

BYLINE: BY CP

DATELINE: GUANTANAMO BAY, Cuba

BODY:

The U.S. military lawyer prosecuting Omar **Khadr** said yesterday that the Canadian teenager is no fresh-faced innocent but a terrorist murderer who deserves to be convicted by a special military tribunal.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of **Khadr**, who was 15 when he was captured after a July 2002 firefight in Afghanistan that killed a U.S. medic. Authorities could have sought the death penalty but didn't because **Khadr** was a juvenile, Davis said in comments the day before the teen's first appearance at a pre-trial hearing.

He said **Khadr** and others picked up the tools of terrorism at al-Qaida training camps. "They weren't making s'mores and learning how to tie knots," said Davis.

Khadr, now 19, is expected to enter a plea in a pre-trial hearing today that's going ahead despite attempts by his defence lawyers to stop it and a pending decision by the Supreme Court on whether the military tribunals are constitutional.

LOAD-DATE: January 11, 2006

Evidence shows Khadr making bombs: prosecutor The Standard (St. Catharines, Ontario) January 11, 2006 Wednesday

January 11, 2006 Wednesday
Final Edition

SECTION: NEWS; Pg. B7

LENGTH: 668 words

HEADLINE: Evidence shows **Khadr** making bombs: prosecutor

BYLINE: Beth Gorham, The Canadian Press

DATELINE: GUANTANAMO BAY, CUBA

BODY:

The U.S. military lawyer prosecuting Omar **Khadr** said Tuesday the Canadian teenager is no fresh-faced innocent who was making s'mores at al-Qaida training camps, but a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of detainees like **Khadr**, who was 15 when he was captured after a July 2002 firefight.

Authorities could have sought the death penalty but didn't because **Khadr** was a juvenile, Davis said, breaking his silence on the case a day before the teen's first appearance at a pretrial hearing that his lawyers tried in vain to stop.

"You'll see evidence when we get into the courtroom of the smiling face of Omar **Khadr** as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that **Khadr** and others picked up the tools of terrorism from al-Qaida.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea today in a contentious tribunal that's proceeding despite motions filed by his defence lawyers and a pending decision by the U.S. Supreme Court on whether the system for foreign terror suspects is constitutional.

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, **Khadr** is charged with murder and other counts arising from the death of medic Christopher Speer and has been held here at the U.S. military detention centre in Guantanamo Bay for the last 39

months.

Few have been allowed to see Khadr, who is nearly blind in one eye and has spent most of his time in isolation at Camp Delta, a barbed-wire enclave on the U.S.-controlled southeast coast of Cuba, near the historic naval base.

One of his American lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that the U.S. military is prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence" that Khadr has been tortured.

And he called on Canada to denounce the tribunal system set up by President George W. Bush, saying it allows confessions extracted by torture and doesn't afford anywhere near the kind of due process of criminal civil trials.

"Canada has a decision to make," said Ahmad, "either to publicly condemn the military commissions as fundamentally unfair ... or to remain silent on the matter and complicit in the sham trial."

It was unclear whether Khadr's Canadian lawyer, Dennis Edney, would attend the hearing.

Ahmad, who saw Khadr on Monday, said he suffers from chronic health problems and has participated in hunger strikes but is in "reasonably good spirits given what he's been subjected to."

Khadr's lawyers and human rights groups closing monitoring the case say he's been constantly interrogated, shackled in painful stress positions for many hours until he's soiled himself and subjected to extreme temperatures.

Davis rejected allegations of widespread torture as standard tactics used on captured terrorists. The detention centre has been open for four years.

"Some of them describe (conditions) as being much better than what they ever had before."

He also vigorously defended the tribunal system for terrorism suspects captured in the Afghanistan war, saying "we've got nothing to be ashamed of."

"We want the world to see that we're extending a full, fair and open trial to the terrorists that have attacked us. We're extending rights to them that they've never contemplated."

The Khadr family has provoked intense debate in Canada. Each of the five Khadr siblings, all of whom are Canadian citizens, has at one time or another been separately accused or investigated for alleged links to terrorism.

Their father, Egyptian-born Canadian Ahmed Said Khadr, was an accused al-Qaida financier killed in a battle with Pakistani forces in 2003.

"

When these guys went to camp, they weren't making

s'mores and learning how to tie knots.

"

Col. Moe Davis chief prosecutor

GRAPHIC:
Photo: Canadian Press; Maha Elsamnah **Khadr**, right, and Fatmah Elsamnah **Khadr** walk away from Ontario Superior Court in Toronto Tuesday. The extradition hearing for Abdullah **Khadr** has been put over until Feb. 2. The 24-year-old **Khadr** was arrested on Dec. 17 on a provisional arrest warrant issued by the United States.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:17 PM EST

U.S. prosecutor builds case against Omar: Murder charge: Khadr 'upset' not to be with bin Laden: Colonel National Post (f/k/a The Financial Post) (Canada) January 11, 2006 Wednesday

National Post (f/k/a The Financial Post) (Canada)

January 11, 2006 Wednesday
National Edition

SECTION: NEWS; Pg. A2

LENGTH: 796 words

HEADLINE: U.S. prosecutor builds case against Omar: Murder charge: **Khadr** 'upset' not to be with bin Laden: Colonel

BYLINE: Sheldon Alberts, CanWest News Service

DATELINE: U.S. NAVAL BASE, Guantanamo Bay, Cuba

BODY:

U.S. NAVAL BASE, Guantanamo Bay, Cuba - The chief prosecutor in the U.S. military's murder case against Canadian teenager Omar **Khadr** painted a dark portrait yesterday of the alleged terrorist as a committed killer who built bombs and likely prays daily to return to Osama bin Laden's inner circle.

In a rare appearance before the international media, Air Force Colonel Morris Davis called sympathetic portrayals of **Khadr** by defence lawyers "nauseating" and suggested the 19-year-old has fabricated claims of torture at the hands of his American interrogators.

"We'll see evidence when we get into the courtroom of the smiling face of Omar **Khadr** as he builds bombs to kill Americans," Col. Davis said on the eve of a planned pretrial hearing here for **Khadr** before a special U.S. military commission.

"It isn't a great leap to figure out why we are holding him accountable."

Khadr, who faces charges of murder by an unprivileged belligerent, has been detained in an open-air cell at the maximum-security Camp Delta since October, 2002.

On the eve of today's hearing, **Khadr** was fed a special meal of halal beef kabobs, Arab rice and spicy chicken to mark Eid ul-Adha, the Feast of the Sacrifice, one of the holiest days of the year for Muslims.

"Normally Mr. **Khadr** and his family spend Eid with the Osama bin Laden family," remarked Col. Davis. "I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden."

Khadr was captured by U.S. forces in July, 2002, after allegedly throwing a grenade that killed Sergeant 1st Class Christopher Speer, a U.S. Army special forces medic, in a battle near Khost in southeastern Afghanistan.

Formally charged last November, Khadr has seen his case swept up in controversy and legal challenges over the legitimacy of the military tribunals established by U.S. President George W. Bush to try alleged terrorists seized after Sept. 11, 2001.

According to the military's charge sheet, Khadr received one month of "one-on-one" private terrorist training at an Afghan camp in June, 2002. The training had been arranged by his father, Ahmad Said Khadr, a high-ranking al-Qaeda financier, the military says.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots," Col. Davis said.

Khadr's civilian lawyer, American University professor Muneer Ahmad, cast today's military commission as a kangaroo court that is rigged to secure a guilty verdict against the Toronto-born man.

Khadr's lead attorney, Army Captain John Merriam, was appointed by the U.S. military commission and has no experience as a trial lawyer, Mr. Ahmad said.

"The military commission process requires Omar to be represented on the charge of murder by a lawyer who has never defended a client at trial even on charges of jaywalking," Mr. Ahmad said. "It would be laughable if the stakes weren't so high."

Khadr is "in reasonably good spirits," said Mr. Ahmad, describing his client as a "kid who has been forced to endure a lot."

Among the defence's primary concerns is that Khadr should not face a war crimes tribunal because he was 15 and a juvenile at the time of the battle against U.S. forces.

But Col. Davis, who personally approved the charges against Khadr, said prosecutors have made concessions to Khadr's age by deciding against seeking the death penalty in his case.

"He killed an American medic. It has not been referred as a capital case. Routinely in the United States, 15-year-olds are held accountable when they commit murder," Col. Davis said.

At times combative during a 15-minute news conference with journalists covering Khadr's hearing, Col. Davis lashed out at media descriptions of the teenager as a fresh-faced youth and said "it is sometimes nauseating to see some of the things that are written."

Responding to defence claims that Khadr has been tortured at Guantanamo, Col. Davis said prosecutors will present evidence that the teenager has described in early letters that he was well treated at the prison.

"It wasn't until later on where all of a sudden he goes from writing home saying, 'Everything's great,' to, 'Oh, I'm being tortured,' " Col. Davis said. "You can probably figure what the strategy is."

He said al-Qaeda members had been trained to allege torture if captured as a means of winning public sympathy.

During the 2002 battle in Afghanistan, Khadr was the lone alleged al-Qaeda member left

alive after a firefight with U.S. troops that lasted several hours.

When U.S. soldiers entered a mud-walled compound, Khadr allegedly tossed a grenade that killed Sgt. Speer. The military has classified him as an "enemy combatant" because he did not belong to a regular army fighting under internationally accepted rules of war.

In effect, Col. Davis said, Khadr had no legal right to throw a grenade at U.S. soldiers.

GRAPHIC: Black & White
Photo: Tyler Anderson, National Post; Maha Elsamnah, mother of Abdullah and Omar Khadr, leaves the Toronto courthouse where Abdullah's bail hearing was held yesterday.; Black & White
Photo: Sheldon Alberts, CanWest News Service; Weeds surround the former interrogation buildings at Camp X-Ray, Guantanamo Bay, where the U.S. shipped suspected terrorists in the months following the Sept. 11, 2001, terrorist attacks. Detainees were later relocated to an open-air maximum-security area on the base named Camp Delta.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:15 PM EST

Khadr portrayed as smiling killer: Hearing today for Canadian terror suspect Ottawa Citizen January 11, 2006 Wednesday

Ottawa Citizen

January 11, 2006 Wednesday
Final Edition

SECTION: NEWS; Pg. A8

LENGTH: 553 words

HEADLINE: Khadr portrayed as smiling killer: Hearing today for Canadian terror suspect

BYLINE: Sheldon Alberts, The Ottawa Citizen; with files from The National Post

DATELINE: GUANTANAMO BAY, Cuba

BODY:

GUANTANAMO BAY, Cuba - Omar Khadr is a committed killer who built bombs and likely prays daily to return to Osama bin Laden's inner circle, says the chief U.S. prosecutor in the murder case against the Canadian teen.

"We'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," air force Col. Morris Davis said on the eve of a planned pre-trial hearing for Mr. Khadr, 19, before a special U.S. military commission.

Mr. Khadr, who faces charges of murder by an unprivileged belligerent, has been detained in open-air, ventilated cells at Camp Delta at Guantanamo Bay since October 2002.

On the eve of today's hearing, Mr. Khadr was fed a special meal of halal-appropriate beef kabobs, Arab rice and spicy chicken to mark Eid ul-Adha, the Feast of the Sacrifice, one of the holiest days of the year for Muslims.

"Normally, Mr. Khadr and his family spend Eid with the Osama bin Laden family," said Col. Davis. "I am sure he is upset that he is here and not in Afghanistan with Osama bin Laden."

Mr. Khadr was captured by American forces in July 2002, after allegedly throwing a grenade that killed Special Forces medic Christopher Speer in a battle near Khost in southeastern Afghanistan.

Formally charged last November, Mr. Khadr's case has been swept up in controversy and legal challenges over the legitimacy of the military tribunals established by U.S. President George W. Bush to try alleged terrorists seized after Sept. 11, 2001.

According to the military's charge sheet, Mr. Khadr received one month of "one-on-one"

private terrorist training at an Afghan camp in June 2002. The training had been arranged by his late father, Ahmad Said **Khadr**, a high-ranking al-Qaeda financier, the military says.

"When these guys went to camp, they weren't making

s'mores and learning how to tie knots," said Col. Davis.

Mr. **Khadr**'s civilian lawyer, American University professor Muneer Ahmad, cast today's military commission as a kangaroo court that's rigged to secure a guilty verdict against the Toronto-born man.

Mr. **Khadr**'s lead lawyer, army Capt. John Merriam, was appointed by the U.S. military commission and has no experience as a trial lawyer, Mr. Ahmad said.

"The military commission process requires Omar to be represented on the charge of murder by a lawyer who has never defended a client at trial even on charges of jaywalking," he said. "It would be laughable if the stakes weren't so high."

He said Mr. **Khadr** is "in reasonably good spirits," and described his client as a "kid who has been forced to endure a lot."

Among the defence's primary concerns is that Mr. **Khadr** shouldn't face the war crime tribunal because he was 15 and a juvenile at the time of the battle against U.S. forces.

But Col. Davis, who personally approved the charges against Mr. **Khadr**, said prosecutors have made recognized Mr. **Khadr**'s age by deciding against seeking the death penalty.

Meanwhile, in Toronto yesterday, Omar **Khadr**'s 24-year-old bother, Abdullah, was in court attending his extradition hearing. Abudallah, held in Pakistan for more than a year, was arrested in Toronto last month after the U.S. Justice Department asked Canadian authorities to detain him on charges he bought weapons, ammunition and explosives for a senior al-Qaeda figure. His case was put over to Feb. 2.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:16 PM EST

YANK RIPS YOUNGER BROTHER The Toronto Sun January 11, 2006 Wednesday

The Toronto Sun

January 11, 2006 Wednesday
FINAL EDITION

SECTION: NEWS; Pg. 34

LENGTH: 137 words

HEADLINE: YANK RIPS YOUNGER BROTHER

BYLINE: BY CP

DATELINE: GUANTANAMO BAY, Cuba

BODY:

Canadian teen Omar **Khadr** is a terrorist killer who deserves to be convicted, a U.S. military prosecutor said yesterday.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of **Khadr**, who was 15 when he was captured after a July 2002 firefight in Afghanistan that killed a U.S. medic.

"You'll see evidence when we get into the courtroom of the smiling face of Omar **Khadr** as he builds bombs to kill Americans," Davis said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging **Khadr** and others picked up the tools of terrorism at al-Qaida training camps.

"They weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea in a pre-trial hearing today that's going ahead despite attempts by his defence lawyers to stop it.

LOAD-DATE: January 11, 2006

Prosecutor says sympathy badly misplaced for teen terrorist Khadr The Guardian (Charlottetown, Prince Edward Island) January 11, 2006 Wednesday

The Guardian (Charlottetown, Prince Edward Island)

January 11, 2006 Wednesday

SECTION: WORLD; Pg. B5

LENGTH: 260 words

HEADLINE: Prosecutor says sympathy badly misplaced for teen terrorist Khadr

BYLINE: Beth Gorham, The Canadian Press

BODY:

The U.S. military lawyer prosecuting Omar Khadr said Tuesday the Canadian teenager is no fresh-faced innocent who was making s'mores at al-Qaida training camps, but a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of detainees like Khadr, who was 15 when he was captured after a July 2002 firefight.

Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said, breaking his silence on the case a day before the teen's first appearance at a pre-trial hearing that his lawyers tried in vain to stop.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging Khadr and others picked up the tools of terrorism from al-Qaida. "When these guys went to camp, they weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea Wednesday in a contentious tribunal proceeding despite motions filed by his defence lawyers and a pending decision by the U.S. Supreme Court on whether the system for foreign terror suspects is constitutional.

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, Khadr is charged with murder and other counts arising from the death of medic Christopher Speer and has been held by the U.S. military in Guantanamo Bay for the last 39 months.

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:11 PM EST

'They weren't making s'mores' The Halifax Daily News (Nova Scotia) January 11, 2006 Wednesday

The Halifax Daily News (Nova Scotia)

January 11, 2006 Wednesday

SECTION: WORLD NEWS; Pg. 16

LENGTH: 333 words

HEADLINE: 'They weren't making s'mores'

BYLINE: CP

BODY:

The U.S. military lawyer prosecuting Omar **Khadr** said yesterday the Canadian teenager is no fresh-faced innocent making snacks at al-Qaida training camps, but a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of detainees like **Khadr**, who was 15 when he was captured after a July 2002 firefight.

Authorities could have sought the death penalty, but didn't because **Khadr** was a juvenile, Davis said, breaking his silence on the case a day before the teen's first appearance at a pre-trial hearing his lawyers tried in vain to stop.

"You'll see evidence when we get into the courtroom of the smiling face of Omar **Khadr** as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that **Khadr** and others picked up the tools of terrorism from al-Qaida.

"When these guys went to camp, they weren't making s'mores and learning how to tie knots."

Khadr, now 19, is expected to enter a plea today in a contentious tribunal that's proceeding despite motions filed by his defence lawyers and a pending decision by the U.S. Supreme Court on whether the system for foreign terror suspects is constitutional.

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, **Khadr** is charged with murder and other counts arising from the death of medic Christopher Speer, and has been held at the U.S. military detention centre in Guantanamo Bay for 39 months.

Few have been allowed to see **Khadr**, who is nearly blind in one eye and has spent most of his time in isolation at Camp Delta, a barbed- wire enclave on the U.S.-controlled southeast

coast of Cuba, near the historic naval base.

One of his American lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" the U.S. military is prosecuting the first war-crimes case of a juvenile, saying he has evidence Khadr was tortured.

GRAPHIC: OMAR KHADR

LOAD-DATE: January 11, 2006

Source: Legal > / . . . / > News, All (English, Full Text)
Terms: khadr and date aft january 10, 2006 (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, January 11, 2006 - 8:14 PM EST

EXHIBIT H

BY ORDER OF THE SECRETARY OF THE AIR FORCE

AIR FORCE INSTRUCTION 51-201
26 NOVEMBER 2003

Law

ADMINISTRATION OF MILITARY JUSTICE

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

NOTICE: This publication is available digitally on the AFDPO WWW site at: **http://www.e-publishing.af.mil.**

OPR: AFLSA/JAJM (Col David W. Madsen)

Certified by: AFLSA/JAJ (Col William K. At Lee, Jr.)

Supersedes AFI 51-201, 2 NOVEMBER 1999.

Pages: 186
Distribution: F

This instruction implements the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), United States, 1984, and Air Force Policy Directive 51-2, *Administration of Military Justice*. It provides guidance and procedures for administering military justice. Users of this instruction must familiarize themselves with the UCMJ, MCM and applicable Department of Defense (DoD) Directives. It does not apply to Air National Guard units and members, unless in Federal service.

SUMMARY OF REVISIONS

This change expands VWAP guidance (paragraphs 7.1.1. and 7.10.15.); updates the unit and address of the USAF Central Repository (paragraphs 7.8.1., 7.13.2., 7.13.4., 7.13.7., 7.13.8., 7.13.9., 7.18.5., 7.18.8.; 12.17.1.2.; 12.17.3.1.; and Figure 7.1. and Figure 7.2.); redesignates the chief of security police (SP) as chief of security forces (SF) (paragraphs 7.13.5., 7.16.2. and 7.16.4.; and Figure 7.1. anFigure 7.4..4); modifies the distribution list for court-martial orders (paragraphs 10.1.9., 10.1.9.1., 10.1.9.2., and 11.4.); expands guidance on the sex offender registration requirements (paragraphs 12.14., 12.15. and 12.15.1.); provides new guidance to ensure compliance with DNA collection under Federal law (paragraphs 12.16. and 12.17.); and provides new guidance to ensure compliance with the Lautenberg Amendment (paragraphs 12.18. and 12.19.). The attachment IC-03-1 is the last attachment of AFI 51-201.

A (|) indicates revision from the previous addition.

Chapter 1

PURPOSE, COMMAND INFLUENCE, PROFESSIONAL CONDUCT

1.1. Purpose. This instruction sets forth requirements for the administration of military justice. Find primary sources of rules and guidance on military justice in the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). Commands may supplement this instruction with approval of Air Force Legal Services Agency, Military Justice Division, (AFLSA/JAJM), 112 Luke Avenue, Room 343, Bolling AFB DC 20332-8000. This instruction requires the collection and maintenance of information protected by the Privacy Act of 1974. The authority to collect and maintain this information is in 10 U.S.C. 854 and 865. Privacy Act system notice F111 AF JA B, court-martial and Article 15 records, applies.

1.2. Unlawful Command Influence (RCM 104). The military justice system must operate free of unlawful command influence. SJAs and their staffs must be sensitive to the existence, or appearance, of unlawful command influence, and they must be vigilant and vigorous in their efforts to prevent it and to respond appropriately to its occurrence. (See Articles 37 and 98, UCMJ). SJAs should periodically discuss with commanders the importance of avoiding even the appearance of unlawful command influence.

1.3. Ethics and Standards of Conduct. The Air Force Rules of Professional Conduct and Air Force Standards for Criminal Justice apply to all military and civilian lawyers, paralegals and nonlawyer assistants in The Judge Advocate General's Department, USAF. This includes foreign national lawyers employed overseas by the Department of the Air Force, to the extent those rules are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts or other proceedings under the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM), or assist others practicing in such proceedings, including, but not limited to, civilian defense counsel (and their assistants) who have no other connection to the USAF. Trial counsel shall provide copies of the Air Force Rules of Professional Conduct and the Air Force Standards for Criminal Justice to civilian defense counsel of record.

12.3.3.4. Information about the Article 32 investigation, including by whom directed, identity of accused's counsel, a listing of Government witnesses, a brief synopsis of their testimony, and the investigating officer's recommendations;

12.3.3.5. Summary of the evidence, including whether the accused testified;

12.3.3.6. Pleas, findings, sentence, and court composition;

12.3.3.7. Prior disciplinary record considered;

12.3.3.8. Date and action of the convening authority;

12.3.3.9. Date and disposition of Article 64, UCMJ, review;

12.3.3.10. Date ROT is expected to be sent to AFLSA/JAJM;

12.3.3.11. Information concerning post-trial confinement; and

12.3.3.12. Information concerning member's excess leave.

12.3.4. Responses About Article 15 Actions. In addition to matters in 12.3.2., provide all pertinent names, dates, and individual elections throughout the Article 15 process from notification of intent to punish through appeal (essentially the information required on the AF Form 3070, **Record of Nonjudicial Punishment**); and discharge action contemplated, if any.

12.3.5. **Responses About Civilian Charges.** In addition to matters in 12.3.2., provide the following as appropriate:

12.3.5.1. Jurisdiction involved (if in a foreign jurisdiction, indicate whether a waiver of jurisdiction has been requested);

12.3.5.2. Charges;

12.3.5.3. Place and dates of pretrial confinement;

12.3.5.4. Name of individual's defense counsel, if any;

12.3.5.5. Summary of the evidence;

12.3.5.6. Maximum authorized punishment;

12.3.5.7. Pleas, findings, and sentence;

12.3.5.8. Appeals filed; and

12.3.5.9. Administrative or disciplinary action taken or contemplated by military authorities.

12.4. Local Responses to High Level Inquiries. When members of the Congress inquire directly to field commanders concerning disciplinary action against a member, retain a copy of the inquiry and reply in the office administrative file for the action. See AFI 90-401, paragraph 4.3, for additional guidance.

Section 12D—Extrajudicial Statements to the Public Relating to Criminal Proceedings and Release of Court-Martial Records.

12.5. General. The permissible release of information which does not have a substantial likelihood of prejudicing a criminal proceeding depends on the type of information to be released and its source, the type of proceeding, and the stage of the proceeding when the information is released.

12.5.1. Information relating to criminal proceedings that has a substantial likelihood of prejudicing a criminal proceeding may not be released.

12.5.2. The release of information relating to a criminal proceeding is subject to the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, applicable laws, such as the Privacy Act, the Freedom of Information Act, the Victim-Witness Protection Act, implementing directives, security requirements, and judicial orders protecting information. Release of Privacy Act protected information to third parties is governed by the Freedom of Information Act.

12.5.3. Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody.

12.5.4. This section does not apply to release of information by military or civilian defense counsel. Defense counsel, both military and civilian, must, however, comply with the Air Force Rules of Professional Conduct and the Air Force Standards for Criminal Justice, portions of which address trial publicity by defense counsel. Military defense counsel must comply with the requirements and restrictions of the Freedom of Information Act and the Privacy Act with regard to trial publicity.

12.6. Extrajudicial Statements. This subsection applies to oral or written statements made outside of a criminal proceeding that a reasonable person would expect to be disseminated by means of public communication.

12.6.1. There are valid reasons for making certain information available to the public in the form of extrajudicial statements. However, extrajudicial statements should not be used for the purpose of influencing the course of a criminal proceeding. Usually, extrajudicial statements should include only factual matters and should not offer subjective observations or opinions.

12.6.1.1. The release of extrajudicial statements is a command responsibility. The installation staff judge advocate (SJA) and the installation public affairs officer (PAO) must work closely together to provide informed advice to the commander. If the extrajudicial statement is based on information contained in agency records, the OPR for the record should also coordinate on the extrajudicial statement prior to release. The convening authority responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. MAJCOM (or equivalent) commanders may withhold release authority from subordinate commanders. In high interest cases, the SJA and the PAO should consult with their MAJCOM representatives.

12.6.1.2. The SJA, trial counsel and defense counsel must ensure investigators, law enforcement personnel, employees and other persons assisting or associated with counsel do not make extrajudicial statements counsel are prohibited from making.

12.6.2. **Extrajudicial Statements Which Generally May Not Be Made.** Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally should not be made:

12.6.2.1. The existence or contents of any confession, admission or statement by the accused or the accused's refusal or failure to make a statement;

12.6.2.2. Observations about the accused's character and reputation;

12.6.2.3. Opinions regarding the accused's guilt or innocence;

12.6.2.4. Opinions regarding the merits of the case or the merits of the evidence;

12.6.2.5. References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations and ballistics or laboratory tests) or the accused's failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

12.6.2.6. Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses;

12.6.2.7. The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes;

12.6.2.8. Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing unless admitted into evidence. (This rule does not prohibit, however, a statement that the accused has no prior criminal or disciplinary record.); and

12.6.2.9. Information trial counsel knows or has reason to know would be inadmissible as evidence in a trial.

12.6.3. **Extrajudicial Statements That May Be Made Under Some Circumstances Regardless of the Stage of the Proceedings.** Subject to the limitations in paragraphs 12.5.1. (Information with a substantial likelihood of prejudicing a criminal proceeding) and 12.5.2., (Rules of Professional Conduct, Standards for Criminal Justice, FOIA, PA, and Victim-Witness Assistance), the following extrajudicial statements may be made when deemed necessary regardless of the stage of the proceeding:

12.6.3.1. General information to educate or inform the public concerning military law and the military justice system;

12.6.3.2. If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers;

12.6.3.3. Requests for assistance in obtaining evidence and information necessary to obtaining evidence;

12.6.3.4. Facts and circumstances of an accused's apprehension, including the time and place of apprehension;

12.6.3.5. The identities of investigating and apprehending agencies and the length of the investigation, only if release this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies;

12.6.3.6. Information contained in a public record, without further comment; and

12.6.3.7. Information that protects the Air Force or the military justice system from the substantial, undue prejudicial effect of recent publicity initiated by some person or entity other than the Air Force. Information in the form of extrajudicial statements shall be limited to that which is necessary to correct misinformation or to mitigate substantial undue prejudicial information already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 investigation or an open session of a court-martial. Unless The Judge Advocate General (TJAG) has withheld the authority to coordinate on

command release of this information for individual cases or types of cases, the MAJCOM SJAs (and equivalents) shall coordinate on release of this information by the appropriate command authority. If TJAG has withheld the authority to coordinate on release of extrajudicial statements, requests for TJAG coordination shall be forwarded through the MAJCOM SJA to AFLSA/JAJM by the most expeditious means appropriate for the sensitivity of the information.

12.6.4. **Extrajudicial Statements That Generally May Be Made Only After Preferral of Charges.** Subject to the limitations in paragraphs 12.5.1. and 12.5.2., the following may be made after preferral of charges:

12.6.4.1. The accused's name, unit and assignment;

12.6.4.2. The substance or text of charges and specifications, provided there is included a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty. As necessary, redact all Victim and Witness Protection Act and Privacy Act protected data from the charges and specifications.

12.6.4.3. The scheduling or result of any stage in the judicial process;

12.6.4.4. Date and place of trial and other proceedings, or anticipated dates if known;

12.6.4.5. Identity and qualifications of appointed counsel;

12.6.4.6. Identities of convening and reviewing authorities;

12.6.4.7. A statement, without comment, that the accused has no prior criminal or disciplinary record or the accused denies the charges; and

12.6.4.8. The identity of the victim where the release of that information is not otherwise prohibited by law. (Generally, however, seek to avoid release of the name of victims of sex offenses, the names of children or the identity of any victim when release would be contrary to the desire of the victim or harmful to the victim).

12.6.4.9. The identities of court members and the military judge. Do not volunteer the identities of the court members or the military judge in material prepared for publication. This information may be released, if requested, after the court members or the military judge have been identified in the court-martial proceeding and the SJA to the convening authority determines release would not prejudice the accused's rights or violate the members' or the military judge's privacy interests.

12.7. **Documentation Pertaining to Criminal Proceedings.** This subsection applies to those documents and agency records created during the course of the military justice process and any document or record incorporated into a military justice document or record. Unless AFLSA/JAJM or higher authority withholds authority, the disclosure authority is the SJA for the convening authority responsible for the criminal proceeding. AFLSA/JAJM is the disclosure authority for all documents and records received at AFLSA/JAJM. File a copy of letters releasing documents or records with the allied papers and immediately notify AFLSA/JAJM of any release. This subsection does not apply to documents or records that originate outside the military justice system of records. The disclosure authority for those documents and records is the OPR for those records under the provisions of the Air Force Privacy Act Program, AFI 37-132, and/or the Air Force Freedom of Information Act Program, AFI 37-131.

12.7.1. **Release of Court-Martial Record of Trial.** A court-martial "record of trial" is defined by RCM 1103(b)(2). The court-martial record of trial is subject to release determination under the Pri-

vacy Act and Freedom of Information Act. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. A "transcript of oral proceedings" is not a record until authentication. When releasing records of trial under this paragraph, redact all Victim-Witness Protection Act and Privacy Act protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

12.7.2. **Release of Other Military Justice Documents or Records.** All other documents or records, including documents which will, but have not yet become part of a "record of trial," and including those which are attached to the court-martial record of trial but not made a part of the record of trial under the provisions of RCM 1103 (for example, an Article 32 report and its attachments) are also subject to release determination under the Privacy and Freedom of Information Acts. However, due regard will be given to the potentially heightened privacy interests of all accused where a case has not been fully adjudicated as well as to whether any exemption, such as those included to protect ongoing deliberative processes or investigative processes should be invoked. Information marked as classified, controlled, or sealed by judicial order should not be released absent an authoritative determination of releasability. When releasing military justice documents or records under this paragraph, redact all Victim-Witness Protection Act and Privacy Act protected data, to include the names of victims of sex offenses, the names of children, and the identity of victims who could be harmed by disclosure of their identity.

12.7.3. **Cases Disposed of by Acquittal or Action Other Than Court-Martial.** When the charges against an accused were disposed of by an action other than court-martial, or when a court-martial results in an acquittal, due consideration must be given to the likelihood that the accused may have increased privacy interests in the protection of information contained in military justice documents or records. That is, less serious misconduct, which is handled administratively rather than judicially generally is not considered of sufficient public interest to outweigh the privacy interest of the individual.

Section 12E—Reporting Officer and Special Interest Cases

12.8. Reporting Officer and Special Interest Cases to HQ USAF. Certain offenses committed by Air Force members generate requests for information within HQ USAF, regardless of the member's rank. Similarly, an accused's rank itself may generate requests for information, or make HQ USAF knowledge of an offense necessary. Staff judge advocates must be sensitive to reporting requirements in this chapter, and make complete and timely reports. Reports should be prepared and forwarded by the base legal office prosecuting the case or, if the case is in a civilian court, the base legal office servicing the unit where the accused is assigned. None of the reporting requirements are intended to preclude a commander's complete evaluation of a case before deciding what action, if any, to take.

12.8.1. **Officer Courts.** Report all officer courts whether military, civilian or in a foreign court. In officer or special interest cases other than those in paragraph 12.8.2., submit initial reports when charges are preferred, within three days of the individual being placed in pretrial confinement (including civilian confinement), or when an officer tenders a resignation for the good of the service, whichever is earliest. SJAs are reminded to report preferral of court-martial charges against colonel selects and above to SAF/IGS (for general officers) or SAF/IGQ (for colonels and colonel selects) IAW AFI 90-130.

Hodges, Keith H. CTR (L)

From: Sullivan, Dwight H Col JTFGTMO OMC (L)
Sent: Thursday, January 12, 2006 11:15 AM
To: [redacted]
Subject: FW: Request for Selected Detailed Defense Counsel

Forwarded, FYI.

Respectfully,
Dwight Sullivan
Col, USMCR

-----Original Message-----
From: [redacted]
Sent: Thursday, January 12, 2006 11:03 AM
To: Sullivan, Dwight, COL, DoD OGC
Cc: [redacted]

Subject: RE: Request for Selected Detailed Defense Counsel

Thanks Dwight....You have addressed all of BGen [redacted] concerns. We will add this to the package as an endorsement and I will approve the request.

R/ RADM M

[redacted] JAGC, USN
Judge Advocate General of the Navy
[redacted]
Suite 3000
Washington, D.C. 20374-5066
[redacted]

-----Original Message-----
From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Tuesday, January 10, 2006 17:49
To:
Cc: [redacted]

Subject: Request for Selected Detailed Defense Counsel

From: Chief Defense Counsel, Office of Military Commissions
To: Judge Advocate General of the Navy

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

RE 56 (Khadr)
Page 1 of 2

Ref: (a) Second Endorsement on CDC OMC ltr 1001 OMC-D of 23 Dec 05
(b) First Endorsement on CDC OMC ltr 1001 OMC-D of 23 Dec 05

1. Initially, I apologize for communicating with you by the relatively informal medium of e-mail. Because I am currently at the U.S. Naval Station Guantanamo Bay, this seems to be the most effective means of communication.

2. I have received reference (a), which requests that I address the expectations that the Staff Judge Advocate to the Commandant expressed in reference (b). This e-mail addresses those expectations.

3. The Staff Judge Advocate to the Commandant noted three expectations in his recommendation on the underlying request that LtCol Colby Vokey serve as selected detailed defense counsel in the commission case of United States v. Khadr. The first expectation is that Khadr will be the only military commission case to which LtCol Vokey will be detailed. The second expectation is that LtCol Vokey will continue to perform his primary assigned duties as the Regional Defense Counsel, Western Region, to include representing clients in courts-martial and administrative boards. The third condition is that the Office of Military Commissions will fund all costs associated with LtCol Vokey's participation in the Khadr case.

4. The detail of defense counsel is within the control of the Chief Defense Counsel of the Office of Military Commissions. I therefore can, and do, agree to the first expectation. LtCol Vokey will be detailed to no military commission case other than United States v. Khadr.

5. I have discussed the second expectation with Col Carol [redacted] the Chief Defense Counsel of the Marine Corps. Col [redacted] has authorized me to state that if LtCol Vokey is made available as selected detailed defense counsel in the Khadr case, she and I will ensure that his participation in the case will not interfere with his ability to perform his primary duty as Regional Defense Counsel, including the representation of clients in individual courts-martial and administrative boards.

6. I have discussed the third expectation with Mr. [redacted] the Chief of Staff of the Appointing Authority's office. Mr. [redacted] has authorized me to state that if LtCol Vokey is made available as selected detailed defense counsel in the Khadr case, the Office of Military Commissions will provide fund cites to cover any TAD costs arising from those duties.

7. Please let me know if I can provide any additional information. The most effective way to communicate with me is by e-mail at this account. Should you so desire, I will, of course, be happy to call you or anyone on your staff to discuss this request.

Very Respectfully,

S/
DWIGHT H. SULLIVAN

RE 56 (Khadr)
Page 2 of 2

1/12/2006

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

4 January 2006

MEMORANDUM FOR APPOINTING AUTHORITY, OFFICE OF THE MILITARY COMMISSIONS

SUBJECT: Request Approval to Communicate with News Media Representatives Regarding Omar Ahmed Khadr

This request is made under protest. It is inappropriate to require defense counsel to obtain permission from the Appointing Authority before engaging in an aspect of my representative duties.

In accordance with Military Commission Instruction 4, section 5(C), undersigned counsel requests permission to communicate with news media representatives regarding Omar Ahmed Khadr. This request is without limitation with respect to the number of media I intend to communicate with or the manner in which I intend to communicate.

Specifically, I request permission to speak on the following non-protected information:

1. The identity of my client;
2. My professional background;
3. Matters that relate to the Commissions process in my role as a defense counsel on behalf of Omar Ahmed Khadr.

I will not discuss any information which is not properly subject to public disclosure.

JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel, Military Commissions

LEGAL ADVISOR TO THE APPOINTING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

5 January 2006

MEMORANDUM FOR CAPTAIN MERRIAM

FROM: THE LEGAL ADVISOR TO THE APPOINTING AUTHORITY

SUBJECT: Media Request of 4 January 2006

1. I have received your memorandum, dated 4 January 2006, requesting permission to "communicate with news media representatives regarding Omar Ahmed Khadr" and listing general subject areas of intended communication.

2. Provided that you adhere to American Bar Association standards for communication with the media in criminal cases and strictly observe the provisions of orders, directives, regulations, instructions, and memoranda related to military commissions, particularly those related to disclosure of protected or classified information, you may communicate with news media representatives regarding Mr. Khadr's identity, your professional background and "matters that relate to the Commissions process" in your role as a defense counsel.

THOMAS L. HEMINGWAY
Brigadier General, USAF
Legal Advisor to the Appointing Authority
For Military Commissions

cc: Chief Defense Counsel for Military Commissions

APPOINTING AUTHORITY, OFFICE OF MILITARY COMMISSIONS

MEMORANDUM FOR RECORD

SUBJECT: Approval for Media Communications – Colonel Morris Davis

In October 2005, pursuant to paragraph 5C, Military Commission Instruction No.3, I authorized Colonel Morris Davis to communicate, consistent with other provisions of commissions law, with the media regarding all trials by military commissions.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

LEGAL ADVISOR TO THE APPOINTING AUTHORITY

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

January 5, 2006

Mr. Muneer I. Ahmad
American University
Washington College of Law
[redacted]
Washington, D.C. 20016-8184

Re: Press Communication in the case of United States v. Khadr

Dear Mr. Ahmad:

I have reviewed your request to communicate with the news media on behalf of your client. Provided that you adhere to the terms of your agreement, particularly those related to disclosure of protected or classified information, you may communicate with news media representatives regarding the identity of your client, your professional background, and other matters related to your representation of Mr. Khadr.

Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel for Military Commissions

AMERICAN UNIVERSITY
WASHINGTON DC

CLINICAL PROGRAM

January 4, 2006

MEMORANDUM FOR APPOINTING AUTHORITY, OFFICE OF THE MILITARY COMMISSIONS

SUBJECT: Request Approval to Communicate with News Media Representatives Regarding Omar Khadr

This request is made under protest. It is inappropriate to require defense counsel to obtain permission from the Appointing Authority before engaging in an aspect of my representative duties.

In accordance with Military Commission Instruction 4, section 5(C), undersigned counsel requests permission to communicate with news media representatives regarding Omar Khadr. This request is without limitation with respect to the number of media I intend to communicate with or the manner in which I intend to communicate.

Specifically, I request permission to speak on the following non-protected information:

1. The identity of my client;
2. My professional background;
3. Matters that relate to the Commissions process in my role as a defense counsel on behalf of Omar Khadr.

I will not discuss any information which is not properly subject to public disclosure.

Respectfully Submitted,

M- I. Ahmad

Muneer I. Ahmad
Associate Professor of Law
Civilian Defense Counsel for Omar Khadr

WASHINGTON COLLEGE OF LAW
[redacted] WASHINGTON, DC 20016-8184 [redacted]

OFFICE OF THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
INTERNAL ROUTING AND TRANSMITTAL FORM

CASE NAME: Khadr	**Date Received:** 05-Jan-06 **SUSPENSE** 1/5/2006
FOR: BGen Hemingway	**ACTION OFFICER:** Mr. [redacted]
SUBJECT: Press Communication in the case of United States v. Khadr	**ACTION OFFICER PHONE:**
	TASKER NUMBER: 286
COPY PROVIDED TO: _____ *for info only* _____ *for info and comment only*	

PURPOSE:

DISCUSSION:

RECOMMENDATION:

APPROVED_____ **DISAPPROVED**_____ **SEE ME**_____

COORDINATION

NAME	PHONE	CONCUR/NONCONCUR COMMENTS	INITIALS	DATE
Deputy Legal Advisor				
Legal Advisor				

Received by Col D.H. Sullivan, USMCR on 6 Jan 06

DATE RECEIVED BY OAA: **ELECTRONIC FILE LOCATION:**

UNITED STATES OF AMERICA	D __ Khadr
v.	**Prosecution Response** To Defense Motion To Order Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements
OMAR AHMED KHADR	**12 January 2006**

1. Timeliness. This Prosecution response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview.

a. The Defense requests the Presiding Officer issue an order directing the Chief Prosecutor for military commissions and the Prosecutors detailed to the case against the accused to "refrain from making inappropriate extrajudicial statements" in violation of applicable service and state codes of professional conduct. The Defense also requests an order directing the Chief Prosecutor "issue a retraction" of his extrajudicial statements or to take appropriate steps "to remediate past inappropriate statements."

b. The Defense argues they are entitled to this relief because of "inappropriate" and "prejudicial" statements made to the media by the Chief Prosecutor. The Defense maintains these statements violated the applicable ethics regulations regarding prosecution conduct and contends that the statements made by the Chief Prosecutor "were designed to increase the level of public opprobrium" directed at the accused.

4. Facts.

a. On 10 January 2006, members of the Defense and the Chief Prosecutor addressed the media regarding the upcoming commission hearing in this case. Both made statements to the media and addressed questions from various reporters for various media outlets.

b. In addition, however, to the press conference held on 10 January, members of the Defense have continually and for a substantial time held numerous other press conferences, made press releases, and participated in countless other interviews with journalists regarding this case. Specifically, the following comments can be attributable to various members of the Defense team:

(1) "Through torture, abuse, and three years of illegal detention, this government has robbed Omar of his youth," said civilian attorney Muneer Ahmad. "Now they are demanding his appearance before a kangaroo court, wholly lacking in fundamental

principles of due process." *The International World News*, January 11, 2006, available at www.jang.com.pk/thenews/jan2006-daily/11-01-2006; *see also* Muneer Ahmad Press release posted on the Center for Constitutional Rights website, available at www.ccr-ny.org/v2/reports.

(2) "The fact that this Administration has seen fit to designate a child for trial by military commission is abhorrent." Ahmad, November 8, 2005, available at www.democracynow.org/article.pl.

(3) "One of Canada's children has been tortured by the United States...." Ahmad, *Canadian Teenager Abused/Raped in Guantanamo Bay*, CTV.ca News Staff, available at www.jambands.ca/sanctuary.

(4) "Today, we have evidence that one of Canada's children has been tortured by the United States," Ahmad said at a press conference at a downtown Toronto hotel yesterday. "The physical and mental abuse that Omar Khadr has received is horrific, it's immoral and it's illegal." *T.O. terror suspect victim of horrific treatment*, 10 Feb. 2005, by Chirs Doucette, TORONTO SUN, available at forum.canadianparents.ca.

(5) He [Ahmad] called on Canada to denounce the tribunal system set up by President George Bush, saying it allows confessions extracted by torture and doesn't afford anywhere the kind of due process of criminal trials. *U.S. prosecutor in Khadr case blasts sympathetic views of Canadian teen*, Pajamas Media, PJM News, available at news.pajamasmedia.com/politics/2006/01/10.

(6) "Canada has a decision to make," said Ahmad, "either publicly condemn the military commissions as fundamentally unfair, or to remain silent on the matter and be complicit in the sham trial." *Id.*

(7) Understand that the room is not a court and the presiding officer is not a judge and this is not a full and fair trial, said Ahmad. "No matter how they dress it up, the military commission is still a sham." *Id.*

(8) One of his U.S lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that Americans are prosecuting the first-ever war crimes case of a juvenile, saying he has "reliable evidence" that Khadr has been tortured over his last 39 months at GTMO. *See* R.E. 54 at 15 Kathleen T. Rhem, "Lawyers Address Thorny Issues on Eve of Military Commissions Hearings," *Armed Forces Information Service*, Jan. 10, 2006.

(9) "Omar alleged threats of torture, rape and was shackled in painful positions for lengthy periods. At one point, where he urinated on the floor during an interrogation, Ahmad said guards used him "as a human mop and used his body to clean up the urine." *Khadr teen tortured in Guantanamo Bay: lawyer*, 9 Feb 2005, CTV.ca News Staff, available at www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050209/Khadr_lawyer_050209.

(10) "When I learned about the abuse, and saw the conditions at Guantanamo, I realized that our military is engaging in a gross deception. The young man I represent who was only 15 when he was taken into custody is being held indefinitely under circumstances that have caused severe psychological damage..." July 14, 2005 *Counsel for Guantanamo Detainees Denouce DoD Testimony on Detentions*, Press Release from Center for Constitutional Rights, quoting Ahmad, 14 Jul 2005, available at www.commondreams.org.

5. Legal Authority.

a. *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).
b. *Cox v. Louisiana*, 379 U.S. 559, 583 (1965).
c. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).
d. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)(J. Holmes).
e. *Nebraska Press Assn. Et Al. v. Stuart, Judge, Et Al.*, 427 U.S. 539, 554-55 (1976).
f. *United States v. Simon*, 664 F. Supp 780, 788 (SDNY 1987).
g. *Levine v. United States District Court for the Central District of California*, 764 F.2d 590, 603 (CA9 1985).
h. *Berger v. United States*, 295 U.S. 78, 88 (1935).

6. Discussion.

a. The Comments of the Chief Prosecutor Do Not Constitute Prosecutorial Misconduct and Were Not in Violation of any Applicable Ethics Regulation; Rather, These Comments Were Appropriately Designed to Counter Numerous and Countless Inflammatory Statements Made by Various Members of the Defense Which Were Designed to Incite Public Outrage and Condemnation on the Prosecution and to Impair the Ability of this Commission to Ensure a Full and Fair Trial.

(1) The Defense position seems to be predicated upon a mistaken belief that the Defense has a right to say whatever it wishes to the media. But a review of the ethics canons cited by and substantially relied upon by the Defense, as well as applicable case law, indicate that neither party has any unrestrained right to say anything it wishes for public dissemination.

(2) Rule 3.6 of the Air Force rules governing professional conduct apply to "a lawyer," not "a prosecutor." Additionally, Rule 3.6 of the District of Columbia's regulations governing the professional conduct of attorneys states, "A Lawyer in a case being tried to a judge or jury...." Like the Air Force regulation, the Rule does not confine itself to just "a prosecutor." Rule 3.6 in North Carolina also applies to "a lawyer" and is not constrained to just "a prosecutor." And finally, the Navy rules governing professional conduct for attorney's practicing under the cognizance of the Navy Judge Advocate General address "a covered attorney" and is not constrained to "a covered prosecutor." All of these rules have as their main objective to prevent attorneys, from either side to a matter being litigated before a court, from making any extrajudicial statements that can

have a reasonable or substantial likelihood of materially prejudicing the ability of a tribunal to ensure a fair trial.

(3) The case law establishes the same concern when it comes to pretrial publicity and the making of extrajudicial statements by either side in a criminal prosecution. The Supreme Court has unambiguously insisted that no one be punished without, "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida,* 309 U.S. 227, 236-37 (1940). The High Court has insisted that public scrutiny not be allowed to hinder the very purpose of a trial—to adjudicate controversies in the courtroom and in accordance with legal procedures designed to ensure a fair trial for both sides. *Cox v. Louisiana,* 379 U.S. 559, 583 (1965). Pivotal to these procedures is the requirement that the tribunal reach a conclusion to the controversy based on the evidence presented at the trial and not from any outside or extrajudicial sources. *Sheppard v. Maxwell,* 384 U.S. 333, 351 (1966). "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454, 462 (1907)(J. Holmes).

(4) Nowhere have the courts held that these principles apply only to a prosecutor and not to the defendant or his attorneys. In fact the High Court expressly ruled that a judge not only has the power, but an obligation to prevent the release of prejudicial information to the media from "counsel for both sides." *Sheppard,* 384 U.S. at 359. As the High Court recognized,

> The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage.

Nebraska Press Assn. Et Al. v. Stuart, Judge, Et Al., 427 U.S. 539, 554-55 (1976). The courts have taken this guidance from our High Court and recognized that these principles apply to both prosecutors and defense attorneys and when necessary, restrictions can be placed on both to prevent prejudicial pretrial publicity from hindering the ability of the tribunal to ensure a fair trial. *See United States v. Simon,* 664 F. Supp 780, 788 (SDNY 1987) ("...but when provoked by attorneys, whether prosecutors or defenders, who seek by use of the press to obtain as partial a jury as possible, courts must respond.")(quoting *Levine v. United States District Court for the Central District of California,* 764 F.2d 590, 603 (CA9 1985)(Sneed, J., concurring)). Thus, all of the applicable ethics regulations as well as case law regarding the matter indicate that defense attorneys and defendants, like prosecutors, cannot make use of the media in an effort prejudice a fair trial.

(5) Commission Law gives the Presiding Officer the duty to ensure an accused receives a full and fair trial. It does not give the accused the right to a prejudicial or biased trial in his favor—only one that is full and fair. As the above case law instructs, the touchstone

to a fair trial is one where the accused will have his case decided before a panel of members who are impartial and who will decide the issue of his guilt or innocence solely on the evidence and arguments presented at trial and not on any information from any extrajudicial source. Thus, when evaluating this issue, the appropriate standard to be applied is whether the conduct from both sides in speaking with the media will prevent a full and fair trial in accordance with Commission Law thereby requiring the Presiding Officer to take appropriate remedial measures.

(6) This principle becomes vital because as shown above, the Defense has continually, systematically, and pervasively made speeches, press releases, and given interviews laden with inflammatory comments about the prosecution, the military commission process, and the American government designed to incite public outrage in the United States, Canada, and around the world. The direct intent is to prejudice the government's ability to fully and fairly try the accused before this forum.

(7) The applicable regulations allow for a lawyer to make a statement to the media that he reasonably believes is required to protect against substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. While a prosecutor is not permitted to make statements to the press designed to prejudice an accused's right to a full and fair trial or designed to incite public condemnation, a prosecutor can make statements designed to rebut and protect the government from public condemnation of its actions incited by inflammatory remarks made by opposing counsel or the accused.

(8) When viewed in this context, the Chief Prosecutor's comments were not intended nor designed to incite public condemnation of the accused, but to reply to the inflammatory comments made by the accused's lawyers with the intent to create public outrage against the prosecution. While "[the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Chief Prosecutor stroke hard blows, but as discussed below, they certainly were not foul, especially in light of the inflammatory comments systematically made by members of the Defense.

(9) Through much of the press conference, the Chief Prosecutor confined his comments specifically in rebuttal to press accounts largely manifested by the Defense. For example, the Chief Prosecutor's comment, "It's my belief that the evidence will show [the accused] is indeed a terrorist" was in direct response to numerous press accounts describing the accused as "a fresh-faced teenager in the full bloom of adolescence." The Chief Prosecutor noted that there was also another press account describing the accused as a "terrorist murderer," and indicated that the latter description in that news account was more accurate. The Chief Prosecutor challenged the "fresh-faced" description, and his statement was intended to show and assure the public that the government was not unfairly charging "a fresh-faced teenager" but a person the evidence will demonstrate is a terrorist. This comment is also reflected in the charge sheet, which is a part of the public domain. In the charge sheet, the government has charged the accused with joining the al Qaida terrorist network, attending training camps designed to train in committing terrorist acts, making improvised explosive devices designed to be used in terrorist activities, and with committing murder. Thus, it is already well known that the government has charged

the accused with being a "terrorist" and a "murderer." Moreover, the Chief Prosecutor made it emphatically clear in this press conference that the government is prosecuting unlawful conduct and not persecuting religious beliefs.

(10) The above case makes it abundantly clear that the public has an interest in knowing that not only are trials completely fair, but also that the government has not unfairly or prejudicially charged any person with unlawful conduct. Taken in context, the Chief Prosecutors comments, while "hard blows" were certainly not "foul," and made abundantly clear the accused has been fairly charged in this case.

(11) The Defense cites the Chief Prosecutor's comment regarding the accused and his family "normally" spending the Eid Muslim holiday with bin Laden. The charge sheet specifically states that the accused had many times spent this Muslim holiday with the bin laden family in Afghanistan. Taken in context of the entire charge sheet, which alleges that the accused joined the al Qaida organization and that the accused actively participated in training camps run by bin Laden and designed to train him to commit various terrorist acts, it is not an unreasonable inference that the accused would prefer to be with bin Laden rather than here detained in Guantanamo Bay, Cuba on Eid. Again, while this may be a "hard blow" it is certainly not a "foul" blow in light of the charge sheet.

(12) The Defense also complains about the Chief Prosecutors comments regarding the accused's murder of Chris Speer. Again, such information is contained in the charge sheet and already well known to the public. In addition, the Chief Prosecutor's comments regarding U.S. military personnel stepping over the dead body of their friend, Chris Speer, in an effort to reach the accused and provide him with medical care in an effort to save his life, was in direct response to allegations made by the accused's defense team that the American government had been providing the accused with inadequate and substandard medical care. The Chief Prosecutor was pointing out that notwithstanding the accused's actions causing the death of a fellow soldier, members of the U.S. armed forces still endeavored to save his life. This specifically was calculated to rebut any allegation that somehow the American government was not interested in providing the accused with the best possible medical care and was calculated to rehabilitate a poor and false image of American officials put out by the Defense. Again, while such may be a "hard blow" in light of the circumstances, it certainly was not "foul."

(13) The Defense next complains that the Chief Prosecutor stated that "you'll get to hear from (former Army Sgt.) Lane Morris, who is not almost blind in one eye, he lost an eye because of Mr. Khadr." Again, just all of the other comments, it must be looked at in context, which will show the true intent behind the statement. Prior to making that statement, the Chief Prosecutor was responding to countless press reports, many again manifested by the Defense, attempting to garner sympathy to injuries the accused received during his firefight with American soldiers. The true intent was again to make the public aware that not only has the accused suffered horrible injuries, but so have our servicemembers. The Chief Prosecutor was simply pointing out that there is another side to this story, that the accused was not the only individual who suffered injury. He was

also making it abundantly clear, that notwithstanding the accused's injuries, it is the government's position that he unlawfully participated in belligerent activities resulting in severe injury and death to U.S. military personnel and that under our law and the law of war, the accused will be held accountable for his unlawful belligerent activities. A review of the press conference reveals the Chief Prosecutor engaged in a discussion regarding the accused's lack of "belligerent privilege" thus making it just and fair for the American government to seek to prosecute him for his unlawful belligerent activities. Again, while this may have been a "hard blow" and certainly was not a "foul" one.

(14) The government has attached a video recording of the entire press conference, to include the Defense's statements as well as the Chief Prosecutor's. The government contends that a complete review of the Chief Prosecutor's statements taken in complete context, will illustrate that where the Chief Prosecutor made "hard blows" none of them were certainly "foul" given the circumstances the government faces publicly, much initiated and perpetuated by the Defense. Moreover, this press conference will illustrate a Chief Prosecutor who prosecutes "with earnestness and vigor..." and who refrains "from improper methods calculated to produce a wrongful conviction" but does "use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).[1]

b. Should the Presiding Officer Believe Remedial Measures are Necessary to Cure Any Potential for Prejudice Resulting from Pretrial Publicity, the Appropriate Measure is to Issue another Emphatic Instructions to the Members Instructing Them Regarding Pretrial Publicity and to Ensure Both Sides Have the Opportunity to Conduct A Searching Voir Dire.

(1) The High Court has made clear that when there is a danger that pretrial publicity and extrajudicial statements made by either counsel can endanger the ability of the tribunal to provide a fair trial, a judge must take remedial action and such remedial action as outlined below often will be suffice to ensure there is a fair trial. *Sheppard*, 384 U.S. at 357 ("...the judge never considered other means that are often utilized to ... protect the jury from outside influence. We conclude that these procedures would have been

[1] The Defense also alleged the Chief Prosecutor made a comment using "nauseating" in reference to the accused and this case. Defense Brief at page 5, paragraph g. A review of the video attached, however, demonstrates the following,

> "I can assure you as the Chief Prosecutor, it is my objective to make these proceedings as open and transparent as possible. We've got nothing to be ashamed of in what we're doing here. So we want you, we want the public, and we want the world to see that we're extending a full, fair and open trial to the terrorists who have attacked us. We're extending rights to them that they've never contemplated. You might have read, it's really sometimes nauseating to read some of the things that have been written. But one in particular where it talked about 'the patriots of Guantanamo,' and how these terrorists are down here standing up for the Bill of Rights. These people are here because they want to destroy the Bill of Rights, not uphold the Bill of Rights."

As can be seen, this comment was not specifically in reference to the accused or his case, but was referring to an oped piece called, *Patriots of Guantanamo*.

sufficient to guarantee Sheppard a fair trial....'). Thus, should the Presiding Officer find that the pretrial publicity in this case, from both sides, presents a danger that there will not be a full and fair trial, the government the following remedial measures will be adequate.

(2) The courts have instructed that the cure for pretrial publicity "lies in those remedial measures that will prevent the prejudice at its inception...." *United States v. Simon*, 664 F.Supp 780, 790 (SDNY 1987) (citing *Sheppard*, 384 U.S. at 363). Thus, the courts have indicated that "information effecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.*

(3) Despite the availability of "censorship," the courts prefer to use less restrictive means if that would ordinarily ensure a fair trial. *Id.* at 793. The courts have endorsed the use of emphatic jury instructions as well as the use of searching voir dire to cure any potential for prejudice in the trial. *Id.* In this case, it is the government's position that the Presiding Officer's initial instructions as well as the availability of counsel to conduct a searching voir dire of the potential members detailed to this case should be adequate to ensure the accused receives a full and fair trial. Additionally, due to the pretrial publicity covering just this initial session, the Prosecution would endorse the Presiding Officer sending out yet another emphatic and stern instruction to the members regarding pretrial publicity. Moreover, a stern warning to both sides that additional inflammatory comments will not be tolerated and that comments to the media must "tone down the rhetoric."

(4) For these reasons, the Government would oppose the Defense's two requests for relief in this motion as the measures outlined above will cure any potential for prejudice to the accused.

7. Burdens. As the movant, Defense bears the burden.

8. Oral Argument. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

9. Witnesses and Evidence. At this time none, but for what is attached to this motion.

10. Additional Information. None.

11. Attachments.

a. "Military tribunal resumes at Guantanamo," *The News*, January 11, 2006.

b. "Headlines for November 8, 2005 – Canadian Teen At Guantanamo to Face Military Tribunal," *Democracy Now*.

c. "Canadian Teenager Abused/Raped in Guantanamo," *The Sanctuary*, February 10, 2005.

d. "Teen alleges abuse," *Canadian Parents*, February 10, 2005.

e. "U.S. prosecutor in Khadr case blasts sympathetic views of Canadian teen," *P.M. News*, January 10, 2006.

f. "Khadr teen tortured in Guantanamo Bay: lawyer," *CTV.ca*, February 9, 2005.

g. "Canada: The time to speak on Khadr is now," *Toronto Star*, January 9, 2006.

h. "Counsel for Guantanamo Detainees Denounce DoD Testimony on Detentions," *Common Dreams News Center*, July 14, 2005.

i. "World invited into Guantanamo court: Canadian teen's hearing to proceed despite challenges," *National Post*, January 10, 2006.

j. Declaration of a Special Agent with the Criminal Investigation Task Force (CITF) regarding his interactions with Omar Khadr, dated April 11, 2006.

k. DVD of the Office of Military Commissions Press Conference, dated January 10, 2006.

12. Submitted by:

[redacted]
Major, U.S. Marine Corps
Prosecutor

Assistant Prosecutor:
[redacted] Lieutenant, JAGC, USN

THE NEWS INTERNATIONAL EDITION
Wednesday January 11, 2006– Zil Hajj 10, 1426 A.H.
ISSN 1563-9479

WORLD NEWS

Military tribunal resumes at Guantanamo

GUANTANAMO BAY, Cuba: Two detainees held at the US naval base at Guantanamo Bay, Cuba, are scheduled to appear before a military tribunal here on Wednesday, even though the US Supreme Court has not yet issued its opinion on the legality of such courts.

Young Canadian Omar Khadr, who was detained in Afghanistan when he was only 15 for allegedly killing a US soldier in July 2002, and Yemeni national Ali Hamza Ahmad al-Bahlul, a suspected al-Qaeda propaganda specialist, are expected to face this week preliminary hearings of their cases.

Many court procedures have been frozen over the past several months by federal judges who deemed it necessary to wait for a Supreme Court ruling early this year on the validity of special tribunals created specifically to try terrorist suspects held at Guantanamo.

However, lawyers representing the detainees, who will appear before the military commissions, did not expect any last minute delay.

The tribunal will first hear the case of al-Bahlul who was indicted in February 2004 of being an accessory to terrorist activities. According to the charge, al-Qaeda founder Osama bin Laden had placed him in charge of producing videos used to recruit and train new members of the organisation. During his first hearing in August 2004, al-Bahlul created confusion in the tribunal by refusing to accept the help of a lawyer and insisting on defending himself.

Since then, US military officials have modified the rules governing the tribunals, and the hearings should start anew. The Canadian, who is 19 and who was charged with murder in November after spending three years at Guantanamo, will appear before a different military commission.

He will be tried under the same rules as other suspects, even though he was a minor when his alleged crime was committed. According to

RE 60 (Khadr)
Page 10 of 38

Viewer's Forum
Fashion Archive
Prize Bonds
Forex- Bank
Forex - Open

Quick Links
Home Page
Daily Jang
Subscription
Ad. Tariff

Email us
Editor Internet
Webmaster
Ad Enquiry

US authorities, Omar Khadr has admitted killing a US military medic and wounding another by throwing a hand grenade in the course of a battle.

His lawyers insist the young man was put through particularly rough interrogations, as well as suffering humiliation and threats of sexual assault.

"Through torture, abuse, and three years of illegal detention, this government has robbed Omar of his youth," said civilian attorney Muneer Ahmad. "Now, they are demanding his appearance before a kangaroo court, wholly lacking in fundamental principles of due process."

Khadr, who was born in Toronto, was raised in Pakistan. His whole family appears to have ties to al-Qaeda. His father, who was killed by the Pakistani army in 2003, was considered one of the key financiers of bin Laden's network.

Previous World News Next

The News International, Pakistan

Update | Top Stories | Business | Karachi | Islamabad | Opinion
Sports | Editorial | Cartoon | National | Lahore | Stocks | Newspost

Daily Digest sign-up

Suscribase al boletin diario en espanol

ARCHIVES

Search for

Browse archives by date

Find radio and TV stations in your local area that air Democracy Now!

Independent Media is more important than ever

Conversation with exonerated death row prisoner Harold Wilson.

A New Documentary featuring Amy Goodman!

Tuesday, November 8th, 2005

Headlines for November 8, 2005

Listen to Segment || Download Show mp3
Watch 128k stream Watch 256k stream Read Transcript
Help Printer-friendly version Email to a friend
Purchase Video/CD

- France Uses Colonial-Era Law To Impose Curfews
- President Bush: "We Do Not Torture"
- Supreme Court To Rule on Guantanamo Military Tribunals
- Canadian Teen At Guantanamo to Face Military Tribunal
- U.S.-Led Assault on Syrian Border Continues
- Iran: Debris From U.S. Spy Planes Found
- IRS Warns Church For Anti-War Sermon
- Record Spending Seen in Many of Today's Race

France Uses Colonial-Era Law To Impose Curfews

In France, curfews and emergency measures have been put in place in an effort to stop a two-week uprising led by immigrant and Muslim youths that began in the Paris suburbs. The civil unrest has now spread to over 300 towns and cities in France and even across the border to Brussels and Berlin. Last night Prime Minister Dominique de Villepin appeared on national television to announce that emergency powers would be invoked under a 50-year-old law. The curfew law was first used in Algeria in an unsuccessful attempt to quell an insurrection at a time when the North African country was a French colony. Suburban youths quoted in the Le Parisien newspaper claimed the emergency measures "won't change anything". One youth said "This isn't going to solve things. More repression means more destruction... more cops is just provocation." Earlier today police announced that nearly 1,200 cars were burnt overnight and 330 arrests were made.

President Bush: "We Do Not Torture"

In Panama on Monday, President Bush responded to increasing criticism over the mistreatment of detainees overseas. "We are finding terrorists and bringing them to justice. We are gathering information about where the terrorists may be hiding," Bush said. "We are trying to disrupt their plots and plans. Anything we do to that end in this effort, any activity we conduct, is within the law. We do not torture."

Democ
Now! Hc
Apps

DN Hol
Stor

New! 1(
audiobook
Amy Goodr
DN! exc

Am
Goodm
Speak
Even
1/21: Melbo
1/27: San Fr
CA
1/27: Bay A
1/28: Arcata
More...

The Exc
to the R

RE 60 (Khadr)
Page 12 of 38

Bush Refuses To Answer Questions on Secret CIA Jails
But President Bush refused to directly answer whether he would allow the Red Cross to have access to prisoners held by the CIA or whether he agreed with Vice President Cheney that the CIA should be exempt from legislation to ban torture.

Senate Prepares to Vote on Investigating Prisoner Abuse
On Capitol Hill, the Senate is preparing to vote as earlier as today on creating an independent commission to investigate prisoner abuse in Iraq, Afghanistan and Guantanamo.

Supreme Court To Rule on Guantanamo Military Tribunals
The U.S. Supreme Court announced Monday it will decide whether the Bush administration can use military tribunals to try detainees being held at Guantanamo Bay. In July a three-judge federal appeals court upheld that a tribunal made up entirely of military officials could try and sentence Salim Ahmed Hamdan, a Yemini man accused of being Osama Bin Laden's bodyguard and driver. On Monday Chief Justice John Roberts recused himself from the case since he was one of the appeals court judges who previously ruled on the case.

Canadian Teen At Guantanamo to Face Military Tribunal
The Pentagon filed war crimes charges against five more detainees at Guantanamo. Those charged include Omar Khadr, a Canadian citizen who has been held by the US since he was 15 years old. Khadr's attorney Muneer Ahmad protested Monday's decision saying "Through torture, abuse, and three years of illegal detention, this government has robbed Omar of his youth... The fact that this Administration has seen fit to designate a child for trial by military commission is abhorrent." The Bush administration has refused to provide assurances that they will not seek the death penalty against him. Khadr was detained in Afghanistan allegedly after throwing a grenade that killed a U.S. soldier.

Pentagon Issues New Directive on Prisoner Interrogation
The Pentagon has issued a new directive on the interrogation of prisoners held by US soldiers. According to the New York Times the new directive prohibits 'acts of physical or mental torture." But the Times reports the Bush administration still hasn't decide whether to ban "cruel" and "humiliating" punishment. The new directive does not apply to CIA interrogators.

Five U.S. Soldiers Charged With Beating Iraqi Detainees
The military announced Monday five U.S. soldiers had been charged with punching and kicking detainees in Iraq. The beatings occurred two months ago.

Television

- CNN
07/19/05: Newsnight with Aaron Brown
06/28/05: Newsnight with Aaron Brown
12/22/04: News with Wolf Blitzer

- MSNBC
02/16/05: Hardball with Chris Matthews
02/01/05: Hardball with Chris Matthews
12/03/04: Hardball with Chris Matthews
11/29/04: Scarborough Country
11/24/04: Hardball with Chris

Matthews

· PBS
11/12/04: Tucker Carlson's Unfiltered

· Charlie Rose Show
Amy Goodman on independent media & war

· POV on PBS
Race in America

· CNN debates
9/14/03: Amy Goodman on Saudi terror bombings
· Archived CNN Transcripts: 1/2002 || 1/2003

Print

· Philadelphia Inquirer:
"She's taking the watchdog to task"

· Daily Camera:
"NYC's 'Democracy Now!' in Boulder"

· Newsweek Online:
"Access of Evil"

· Los Angeles Times:
"Left-wing radio's Amy Goodman takes her views on the road."

· Tucson Weekly:
"Names Amy Goodman "Best Radio Talk Show Host"

· Arizona Daily Star:
"'Democracy Now!' host brings criticism of war coverage to Tucson stage"

· Guerrilla News Network:
"Guerrilla of the Week"

· The Hindu:
"The Other Side Of The News"

· Washington Post:
"Peace Commander, DN! Host Amy Goodman making her voice heard on Iraq"

· Wall Street Journal:
"Pacifica Radio Network Becomes Antiwar Voice"

U.S.-Led Assault on Syrian Border Continues
In Iraq, a major U.S.-led air and ground offensive along the Syrian border has entered its fourth day. U.S. warplanes have been firing Hellfire missiles and dropping 500 pound bombs. The U.S. military has said it has killed 36 in the assault and claimed they were all insurgents.

Four U.S. Troops Killed in Suicide Attack
In Baghdad, four US troops died Monday in a suicide car bombing. It was deadliest suicide attack against U.S. forces in four months. In Mosul an Iraqi newspaper journalist was shot and killed at an Internet cafe. And in Washington, the Pentagon announced it would likely keep at least 92,000 troops in Iraq through 2008.

Iran: Debris From U.S. Spy Planes Found
The Iranian government is claiming it has found the wreckage of two U.S. spy planes inside its borders. The planes reportedly crashed during the summer. Iran disclosed the find at the United Nations on Monday where it accused the United States of breaking international law and violating its sovereignty. Earlier this year Seymour Hersh of the New Yorker reported that the Pentagon has begun secretly sending forces in to Iran to identify possible future military targets.

Chalabi Heads Back to D.C.; No Investigation Yet on Iran Spy Charges
The Wall Street Journal reports 17 months have passed since the Bush administration announced a full criminal inquiry into allegations that Iraqi exile Ahmad Chalabi leaked U.S. intelligence secrets to Iran. The FBI hasn't even interviewed Chalabi or any U.S. official connected to the matter. Chalabi is arriving in Washington today for his first official visit in two years. He is planning on speaking at the American Enterprise Institute on Wednesday and will be meeting with Secretary of State Condoleezza Rice and Treasury Secretary John Snow.

Australia Arrests 15 Disrupting Alleged Plot
In Australia, police have arrested 15 people including a prominent Islamic cleric. They are accused of preparing to stage a "catastrophic act of terrorism" but few details on the plot were released. The arrests came in a dramatic fashion. More than 450 heavily-armed officers backed by helicopters raided 20 homes across Sydney and Melbourne. One of the suspects was shot in the head. Police said he had refused orders to stop.

IRS Warns Church About Anti-War Sermon
The Internal Revenue Service has warned one of Southern California's largest churches it could lose its tax-exempt status because a priest gave a sermon criticizing the Iraq war two days

before last year's presidential election. The IRS has sent the All Saints Episcopal Church in Pasadena a warning that the federal tax code prohibits tax-exempt organizations, including churches, from intervening in political campaigns and elections. The IRS has issued warnings to other non-profits, including the NAACP, for issuing statements deemed critical of the president.

Ex-Peruvian President Fujimori Arrested
In news from Latin America -- Alberto Fujimori, the former president of Peru, has been arrested in Chile. Peruvian officials said they are preparing to request his extradition to Peru, where he's wanted on 21 criminal charges alleging human rights violations and corruption. Fujimori has lived in Japan since his resignation in 2000.

Record Spending Seen in Many of Today's Races
And today is election day in many parts of the country. Voters in New Jersey and Virginia will be electing a new governor. In New York City, the mayoral race has pitted Mayor Michael Bloomberg against Fernando Ferrer. All three races have seen record amounts spent on the campaign. In New York, Bloomberg has shattered campaign finance records in a non-presidential-race by spending up to $100 million on his re-election - ten times what Ferrer has spent. In New Jersey gubernatorial candidates U.S. Senator Jon Corzine and Republican Doug Forrester have spent a combined $70 million making it the priciest campaign in state history. And in Virginia Republican Jerry Kilgore and Democrat Tim Kaine have spent a record $40 million. Voters will also be electing mayors in Atlanta, Boston, Detroit, Houston, Miami, Minneapolis, San Diego, Seattle and other cities. And in California, voters will decide the fate of several ballot initiatives backed by Governor Arnold Schwarzenegger. The initiatives deal with teacher tenure, union dues, budget cuts and the state legislature's power to draw political boundaries.

StoneMtn
Hall-of-Famer

Reged: 08/18/04

Posts: 962
Loc: Whistler, BC

Canadian Teenager Abused/Raped in Guantanamo Bay
#205247 - 02/10/05 09:03 AM

Whatever opinions you may have on al Qaeda, I think it's clear that the world can't sit back and let the US detain people, indefinitely, without trying them in an open forum. I think it's even clearer that we can't simply acquiesce to torture, of ANYONE (let alone a Canadian teenager), in any form...

"Omar alleged threats of torture, rape and was shackled in painful positions for lengthy periods.

At one point, where he urinated on the floor during an interrogation, Ahmad said guards used him 'as a human mop and used his body to clean up the urine.'"

Quote:

Khadr teen tortured in Guantanamo Bay: lawyer
CTV.ca News Staff

Lawyers for a Canadian teenager imprisoned in Guantanamo Bay say it's put up or shut up time for the U.S. government, which they further claim has abused **Omar Khadr**.

"At the end of the day, I want to bring this to an end," Dennis Edney, Canadian lawyer for **Omar Khadr**, said Wednesday at a news conference.

"It's three years on. You've mistreated this boy for years. Let's see the evidence and let's go to trial."

Omar, now 18, is part of the infamous **Khadr** family. His later father Ahmed was a known associate of al Qaeda leader Osama bin Laden.

Ahmed died in a 2003 shootout with Pakistani police. Karim **Khadr**, another of his teenaged sons, was wounded in that incident and left paralyzed. Karim returned to Canada.

Abdullah, an older brother, was accused of running an al Qaeda training camp in Afghanistan. His whereabouts are unknown.

Abdulrahman, another brother, was a fellow Guantanamo detainee. He initially told a story of being returned to Afghanistan, but then claimed he was hired by the CIA to spy on al Qaeda recruiters in Bosnia.

U.S. authorities captured **Omar**, then 15, in Afghanistan. They declared him an enemy combatant. He is the youngest of an estimated 550 prisoners in Guantanamo, a U.S. enclave on the island of Cuba that has been turned into a prison for so-called "war on terror" suspects.

They accuse him **Omar** of laying mines aimed at U.S. convoys and of having thrown a hand grenade that killed a U.S. army medic. However, they haven't actually charged him with anything.

Abuse claims

"One of Canada's children has been tortured by the United States," said **Muneer** Ahmad, a Washington-based lawyer. He visited with **Omar** for four days in November.

Omar alleged threats of torture, rape and was shackled in painful positions for lengthy periods.

At one point, where he urinated on the floor during an interrogation, Ahmad said guards used him "as a human mop and used his body to clean up the urine."

Omar's mother appeared at Wednesday's news conference and issued this plea through Edney: "As a mother, I beg every Canadian mother and father to help me get justice for my son and bring him home."

Canadian officials say they have been assured by the U.S. that Khadr is being treated humanely.

"Omar is abandoned in a legal black hole beyond the rule of law by a lawless U.S. administration and the Canadian government participates in that violation," Edney said, noting that detainees from other western countries have been released after pressure from their governments.

He further claimed that RCMP, CSIS and Foreign Affairs had participated in Omar's interrogations.

By declaring the Guantanamo detainees enemy combatants instead of prisoners of war, the U.S. believes they aren't subject to the Geneva Conventions.

The U.S. Justice Department is investigating claims of mistreatment that originate in FBI e-mails.

According to a lawsuit launched by the American Civil Liberties Union, the e-mails describe prisoners being chained for up to 24 hours. They also describe prisoners being left in their own feces and urine in rooms that were either extremely hot or cold.

There have been other reports of prisoner abuse, but not as grave as those which occurred at Abu Ghraib prison in Iraq.

I'm a post hee-haw mover;
a funkadelic, punk rock groover;
a cross between Bela Fleck and Eddie Vedder,
but better.

Post Extras: [Print Post] [Remind Me!] [Notify Moderator]

Stapes
World Idol

Re: Canadian Teenager Abused/Raped in Guantanamo Bay [Re: StoneMtn]
#205257 - 02/10/05 09:17 AM

RE 60 (Khadr)
Page 18 of 38

[redacted]

Inside C

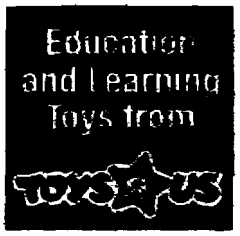
CANADIAN PARENTS.com

[redacted]

PREGNANCY
BABIES
TODDLERS & PRESCHOOLERS
SCHOOLAGED
TWEENS & TEENS
FAMILY ROOM

[redacted]

WHO'S ONLINE?



You are not logged in. [Login]

Main Index · Search · New user · Who's Online
FAQ · Calendar · User List

Community Boards >> News and Views

Previous | Index | Next

Momtwice
Moderator

Registered: 03/06/00
Posts: 2130

T.O. terror suspect victim of 'horrific' treatment
02/16/05 07:20 AM

Edit | Reply

I believe this is the same family of which we discussed their return to Canada for he (son in wheelchair) while the family professed their allegiance to Bin Laden.

Quote:

Teen alleges abuse
By CHRIS DOUCETTE, Toronto Sun
TORONTO -- An American human rights lawyer says newly declassified statements made by a Toronto-born teen being held at Guantanamo Bay pro has been tortured and abused. Muneer Ahmad met in November with Omar in Cuba, where the youth has been detained -- along with hundreds of other suspected terrorists -- since his capture in a battle with U.S. forces in Afghan in July 2002, when he was just 15.
But U.S. officials only recently approved public release of parts of his conversations with the now-18-year-old.
"Today, we have evidence that one of Canada's children has been tortured b United States," Ahmad said at a press conference at a downtown Toronto ho yesterday. "The physical and mental abuse that Omar Khadr has received is horrific, it's immoral and it's illegal."
During one of many lengthy interrogations, Khadr alleges he was forced to u in his pants. And then, with his hands and feet cuffed together behind his bac military police used him "as a human mop" to wipe up the floor.
He also claims MPs threatened him with rape, telling him he would be sent to Afghanistan where they like "small boys."
NO FORMAL CHARGES
In a prepared statement read by Edmonton-based lawyer Dennis Edney, the detained teen's mom, Maha Elsamnah, begged Canadians to help her fight t bring her son home.
"The way my son has been abused over (two) years without any charges co happen to any Canadian child (and) I do not wish any parent to go through th pain that I'm going through now," wrote Elsamnah, who wept throughout the conference. "The Canadian government has done nothing to help my son, s asking all Canadian mothers and fathers to push Canada to speak for him."
Khadr has been accused of killing a U.S. soldier with a grenade and planting mines to take out military convoys. But with no formal charges against the te Edney said it's time for U.S. officials "to put up or shut up."
The teen's father, Ahmed Khadr, was close to Osama bin Laden and died in shootout in Pakistan in 2003. Two of his brothers, one of whom was also cap and has since been released, the other of whom was shot in the spine and is recovering in Canada, have ties to al-Qaida.
Liberal MP Dan McTeague, Parliamentary secretary to Foreign Affairs Minist Pierre Pettigrew, said the federal government will continue to press American

RE: Omar Khadr
Page 19 of 38

authorities to obtain consular access for Khadr.
"We have been given assurances by the Americans that he is being treated i humane way and we take the Americans at their word," he said. "We believe emphatically that the rule of law must apply as it does everywhere else."

Sharon
Mom of two awesome teens!
News & Views Moderator
Discipline Board Moderator
Children's Arts & Crafts Moderator

I am not afraid of storms for I am learning how to sail my ship
Louisa May Alcott

Post Extras

Entire thread

Subject	Posted by	Posted on
T.O. terror suspect victim of 'horrific' treatment	Momtwice	02/10/05 07:39 AM

Extra Information

1 registered and 1 anonymous users are browsing this forum.

Moderator: Momtwice

Forum Permissions
You cannot start new topics
You cannot reply to topics
HTML is enabled
UBBCode is enabled

Rating:
Thread views: 44

Rate this thread [1 star]

News and Views

Contact Us Canadian Par

POWERED BY INFOPOP
UBB.threads™ 6.4.3

TOP STORIES

- Correcting the Record: Wikipedia vs The Register
- Dozens killed in Hajj stampede
- Manics, writers, and bloggers
- Fetus Updates
- The Tide is Turning in Iraq
- A completely foolish article
- Spirit of America Releases Anonymous Blogging Guides
- Super Soaker Used as Ear Syringe
- Trees! It was trees all along
- From carrier pigeon to Boeing-747

MAIN

- About Us
- Advisory Board
- Staff
- Info
- Contact Us
- Press Room
- RSS Feeds

BLOGS

- Pajamarama
- PJ Blogs
- Blogroll
- Carnivals

NEWS

- United States
- World
- Politics
- Science
- Health
- Lifestyle

PAJAMASMEDIA™

Story Date: 2006-Jan-10 at 2
BETH GC

U.S. prosecutor in Khadr case blasts sympath views of Canadian teen

Categories: crime, law and justice / unrest, conflicts and war / law and the judiciary (system of justi international law / crime / war / Global / law enforcement / anti-terror / disaster and accident / man-m disaster / terrorist attack / terrorism / terrorism / supreme court / conflict (general) / criminal law / civi war crime / Canada, Mexico / defense / politics / international military intervention / prisoners and detainees / Middle East / Intifada and jihad / Islam / religion and belief / armed conflict / armed force United States / civil unrest / punishment / international court or tribunal / civil rights and justice

GUANTANAMO BAY, Cuba, Jan. 10, 2006 (The Canadian Press delivered by Newstex) – The U.S. military lawyer prosecuting Omar Khadr said Tuesday the Canadian teenager is no fresh-faced innocent who was making s'mores at al-Qaida training camps, but a terrorist who deserves to be convicted by a special military tribunal for killing a U.S. medic.

Chief prosecutor Col. Moe Davis blasted "nauseating" sympathetic portrayals of detainees like Khadr, who was 15 when he was captured after a July 2002 firefight.

Authorities could have sought the death penalty but didn't because Khadr was a juvenile, Davis said, breaking his silence on the case a day before the teen's first appearance at a pre-trial hearing that his lawyers tried in vain to stop.

"You'll see evidence when we get into the courtroom of the smiling face of Omar Khadr as he builds bombs to kill Americans," he said.

"I don't think it's a great leap to figure out why we're holding him accountable," added Davis, charging that Khadr and others picked up the tools of

Recently in politics 2006/01/10:

- KRTB: City tackles anim waste
- KRTB: Business group ousts its outspoken president
- KRTB: Competing plans f Scripps complex fine-tun proposals in last-minute pitches
- KRTB: Lower profits brin down retail gas prices
- PRN: Industrial Alliance takes up 444,280 additior Clarington shares as offe expires
- XIN: Seoul removes "Top Scientist&quc title from disgraced Hwa Woo-suk
- KRTB: Miami County agr juggles funding

RE 60 (Khadr)
Page 21 of 38

- Entertainment
- Business
- Sport

ARCHIVES

- Top Stories
- Best of the Blogs
- Blogjams

TIP DOOR

Send news tips to PJM

SUBMIT

terrorism from al-Qaida.

"When these guys went to camp, they weren't making s'mores and learning how to knots."

Khadr, now 19, is expected to enter a plea Wednesday in a contentious tribunal tha proceeding despite motions filed by his defence lawyers and a pending decision by U.S. Supreme Court on whether the system for foreign terror suspects is constitutio

A member of a Toronto family with alleged ties to terrorist leader Osama bin Laden, is charged with murder and other counts arising from the death of medic Christophe Speer and has been held here at the U.S. military detention centre in Guantanamo the last 39 months.

Few have been allowed to see Khadr, who is nearly blind in one eye and has spent of his time in isolation at Camp Delta, a barbed-wire enclave on the U.S.-controlled southeast coast of Cuba, near the historic naval base.

One of his American lawyers, Muneer Ahmad, called it "astounding, shameful and appalling" that the U.S. military is prosecuting the first-ever war crimes case of a juv saying he has "reliable evidence" that Khadr has been tortured.

And he called on Canada to denounce the tribunal system set up by President Geo Bush, saying it allows confessions extracted by torture and doesn't afford anywhere the kind of due process of criminal civil trials.

"Canada has a decision to make," said Ahmad, "either to publicly condemn the milit commissions as fundamentally unfair Â Â . or to remain silent on the matter and cc in the sham trial."

It was unclear whether Khadr's Canadian lawyer, Dennis Edney, would attend the h

Ahmad, who saw Khadr on Monday, said he suffers from chronic health problems a participated in hunger strikes but is in "reasonably good spirits given what he's beer subjected to."

Khadr's lawyers and human rights groups closing monitoring the case say he's beer constantly interrogated, shackled in painful stress positions for many hours until he' soiled himself and subjected to extreme temperatures.

Davis rejected allegations of widespread torture as standard tactics used on captur terrorists. The detention centre has been open for four years.

"Some of them describe (conditions) as being much better than what they ever had before."

He also vigorously defended the tribunal system for terrorism suspects captured in t Afghanistan war, saying "we've got nothing to be ashamed of."

"We want the world to see that we're extending a full, fair and open trial to the terror

that have attacked us. We're extending rights to them that they've never contemplat

The Khadr family has provoked intense debate in Canada. Each of the five Khadr si all of whom are Canadian citizens, has at one time or another been separately accu investigated for alleged links to terrorism.

Their father, Egyptian-born Canadian Ahmed Said Khadr, was an accused al-Qaida financier killed in a battle with Pakistani forces in 2003.

Davis referred to the family's connection to bin Laden, claiming the Khadrs always s Tuesday's feast of the sacrifice, or Eid al Adha, with the terror mastermind.

"So I'm sure (Omar's) upset that he's here and not in Afghanistan."

Davis argued that the new threat posed by al-Qaida and Taliban terrorists has necessitated changes in military law, just as there were revisions for the Nuremberg of Nazis after the Second World War.

"Some say we're making up the rules as we go along but the law has to adapt to toc environment," said Davis.

"We're here to prosecute unlawful conduct, not persecute religious beliefs."

It's particularly galling, said Davis, that rights organizations are calling some 500 de the "patriots of Guantanamo" who are standing up for their rights, yet they delay the military tribunals by every means possible.

"I hate to quote Bart Simpson as an authority but damned if you do, damned if you d That's the situation that we face."

Only nine of the detainees have been formally charged with war crimes and three of tribunals have been stayed pending the Supreme Court decision, expected by June

There are a couple dozen other cases in the works, said Davis, with charges expec the coming months. Some will likely be completely open, but others will be restricte parts for security reasons.

Khadr will be formally represented by Capt. John Merriam, a U.S. army judge advoc with no trial experience, "even on charges of jaywalking," said Ahmad, who is askin he be replaced by someone with more experience.

"It would be laughable if the stakes weren't so high," he said.

The tribunal is headed by Col. Robert Chester.

"Understand that the room is not a court and the presiding officer is not a judge and not a full and fair trial," said Ahmad. "No matter how they dress it up, the military commission is still a sham."

U.S. authorities say Khadr threw a grenade that killed Speer in an alleged al-Qaida

compound. The teen was shot three times by American soldiers.

"Thanks to the American medics who stepped over their dead friend and tended to I Khadr, he's alive today," said Davis.

Khadr was formally charged last November with murder, attempted murder, aiding t enemy and conspiracy. He's been designated an "unprivileged belligerent" who didr have the right to wage war.

In what Ahmad has called a "crass political move," word of the charges came the se day the U.S. high court said it consider the tribunals faced by Khadr and eight other far.

"The timing has not been at its best," admitted Davis. "In that particular case, it was already in the works."

Preliminary hearings took place for four of the men in 2004, including Salim Ahmed Hamdan, a former driver for bin Laden whose case sparked the Supreme Court cha

Khadr is expected to attend the hearing in his first public appearance since he was captured and then sent to Guantanamo in October 2002 just after he turned 16.

Ali Hamza al-Bahlul, a Yemeni, is also facing a pre-trial hearing on a conspiracy cha U.S. authorities allege he provided protection to bin Laden and was a propagandist Qaida.

Al-Bahlul is insisting he doesn't want the military-appointed defence lawyer and wou rather defend himself.

Newstex ID: AP-0004-6917633
Tagline:

Credit:

Omar Khadr's mother and grandmother cry during the press conference in Toronto.

Khadr teen tortured in Guantanamo Bay: lawyer

Updated Wed. Feb. 9 2005 11:31 PM ET

CTV.ca News Staff

Lawyers for a Canadian teenager imprisoned in Guantanamo Bay say it's put up or shut up time for the U.S. government, which they further claim has abused Omar Khadr.

"At the end of the day, I want to bring this to an end," Dennis Edney, Canadian lawyer for Omar Khadr, said Wednesday at a news conference.

"It's three years on. You've mistreated this boy for years. Let's see the evidence and let's go to trial."

Omar Khadr

Omar, now 18, is part of the infamous Khadr family. His later father Ahmed was a known associate of al Qaeda leader Osama bin Laden.

Ahmed died in a 2003 shootout with Pakistani police. Karim Khadr, another of his teenaged sons, was wounded in that incident and left paralyzed. Karim returned to Canada.

Abdullah, an older brother, was accused of running an al Qaeda training camp in Afghanistan. His whereabouts are unknown.

Abdulrahman, another brother, was a fellow Guantanamo detainee. He initially told a story of being returned to Afghanistan, but then claimed he was hired by the CIA to spy on al Qaeda recruiters in Bosnia.

U.S. authorities captured Omar, then 15, in Afghanistan. They declared him an enemy combatant. He is the youngest of an estimated 550 prisoners in Guantanamo, a U.S. enclave on the island of Cuba that has been turned into a prison for so-called "war on terror" suspects.

They accuse him Omar of laying mines aimed at U.S. convoys and of having thrown a hand grenade that killed a U.S. army medic. However, they haven't actually charged him with anything.

Abuse claims

"One of Canada's children has been tortured by the United States," said Muneer Ahmad, a Washington-based lawyer. He visited with Omar for four days in November.

Omar alleged threats of torture, rape and was shackled in painful positions for lengthy periods.

At one point, where he urinated on the floor during an interrogation, Ahmad said guards used him "as a human mop and used his body to clean up the urine."

Omar's mother appeared at Wednesday's news conference and issued this plea through Edney: "As a mother, I beg every Canadian mother and father to help me get justice for my son and bring him home."

Canadian officials say they have been assured by the U.S. that Khadr is being treated humanely.

"Omar is abandoned in a legal black hole beyond the rule of law by a lawless U.S. administration and the Canadian government participates in that violation," Edney said, noting that detainees from other western countries have been released after pressure from their governments.

He further claimed that RCMP, CSIS and Foreign Affairs had participated in Omar's interrogations.

By declaring the Guantanamo detainees enemy combatants instead of prisoners of war, the U.S. believes they aren't subject to the Geneva Conventions.

The U.S. Justice Department is investigating claims of mistreatment that originate in FBI e-mails.

According to a lawsuit launched by the American Civil Liberties Union, the e-mails describe prisoners being chained for up to 24 hours. They also describe prisoners being left in their own feces and urine in rooms that were either extremely hot or cold.

There have been other reports of prisoner abuse, but not as grave as those which occurred at Abu Ghraib prison in Iraq.

TORONTO STAR
www.thestar.com
Thu. Jan. 12, 2006. | Updated at 09:03 AM

Canada: The time to speak on Khadr is now

Jan. 9, 2006. 01:00 AM

RICK WILSON AND MUNEER AHMED

As the new year begins, 19-year-old Canadian Omar Khadr continues his fourth year in American captivity at Guantanamo Bay, Cuba.

Only 15 at the time U.S. troops took him prisoner, for the past three years Khadr has been held in solitary confinement, virtually incommunicado, without charge, and subject to torture and abuse during continuous interrogation by his captors.

The U.S. has now charged Khadr with alleged war crimes, and plans to try him before a military commission beginning Wednesday. Despite international condemnation of the commission as fundamentally unfair, the Canadian government, regrettably, has kept silent on Khadr's prosecution.

What is at stake on Wednesday is not only Khadr's future, but Canada's reputation as a defender of human rights and the rule of law.

When the military commission commences, Khadr will become the first individual in the modern history of any international tribunal, to be tried for war crimes for conduct allegedly committed as a juvenile.

This ignoble precedent of prosecuting children for war crimes — something not done at Nuremburg after World War II, in the former Yugoslavia, Rwanda, or Sierra Leone, Kosovo or East Timor — will be established through American prosecution of a Canadian child.

As Khadr's American lawyers, we are well aware of the negative publicity that swirls around the Khadr family. But we have seen something that few in Canada ever have: Khadr himself.

For all the stories about the Khadrs, it is easy to forget that Omar was just a boy when he was taken prisoner, and is still a boy now. He wears a scraggly beard — something he couldn't even grow when he first got to Guantanamo — and like any adolescent, he has gone through a rapid growth spurt.

Khadr and others.

They also allow the exclusion of Khadr from portions of his own trial and deny him the opportunity to confront his accusers. The rules authorize the government to eavesdrop on attorney-client communications and allow evidence to be withheld from civilian counsel, despite security clearances.

To date, no Canadian lawyer has been permitted to see Khadr. His appointed military counsel is a 31-year-old U.S. army captain who has never represented a defendant at trial.

These deficiencies in the military commission, and many others, expose the lie of the Bush administration's promise that Khadr is innocent until proven guilty. No matter how they dress it up, the military commission is still a sham.

The military commissions have been roundly condemned by human rights organizations, and even by foreign governments.

Britain stated unambiguously its belief that the commissions were "unacceptable" for their failure to meet international standards. As British Attorney General Lord Goldsmith said, "There are certain principles on which there can be no compromise ... Fair trial is one of those." Subsequently, all nine Britons at Guantanamo, including two designated for military commissions, were released.

Are Britain's standards for due process higher than Canada's?

Private diplomacy may have been warranted in the past, but the time has come for the Canadian government to speak out on behalf of Khadr.

The window of opportunity for Canadian influence is about to close: Once the hearings begin, Canada's public silence will properly be interpreted as tacit approval of the use of an illegal, fundamentally unfair process against one of its citizens.

In the days remaining before Khadr's commission begins, Ottawa must answer publicly one simple question: Does it believe that the military commissions meet Canadian standards of due process for the trial of its child-citizen for war crimes?

For Canada to remain silent now is to be complicit in the show trial of one of its citizens, and to abandon Canadian claims to leadership on human

Common Dreams
NEWSCENTER
Breaking News & Views for the Progressive Community
www.commondreams.org

FOR IMMEDIATE RELEASE:
JULY 14, 2005
3:07 PM

CONTACT: Center for Constitutional Rights
Mahdis Keshavarz, Riptide Communications (212)260-5000
Barbara Olshansky, Center for Constitutional Rights (212) 614-6439
Muneer Ahmad, American University, counsel to O.K. (202) 274-4389
Baher Azmy, Seton Hall Law School, counsel to Kumaz, (973)-642-8281
Marc Falkoff, Covington & Burling, counsel to Al Wahab (212) 841-1166
Melissa Hoffer, Wilmer Cutler Pickering Hale and Dorr, counsel to Boumediene (617) 526-6875
Joshua Colangelo-Bryan, Dorsey & Whitney, counsel to Al Dossari and Al Nosimi (212) 415-9234

Counsel for Guantanamo Detainees Denounce DoD Testimony on Detentions

Renew Call for Independent Investigation of Prisoner Abuse

NEW YORK - July 14 - Attorneys with the New York-based Center for Constitutional Rights (CCR), today criticized Department of Defense testimony before the Senate Armed Services Committee. The testimony confirmed the Administration's continuing refusal to hold military decision-makers accountable for prisoner abuse at Guantánamo and elsewhere. Despite formal objections by experienced FBI investigators who witnessed widespread abuse at Guantánamo in connection with interrogations, DoD officials continue to deny involvement.

Interviews with detainees imprisoned by the U.S. military in Guantánamo, Iraq, and Afghanistan, establish without question that the United States has engaged in a policy of abusive detentions and interrogations that must be remedied. Interviews of Guantánamo prisoners revealed:

- Canadian O.K., a juvenile who was approximately 15 years old when he was taken into custody by U.S. forces in 2001, was threatened by interrogators who, on several occasions, told O.K. he would be sent to Egypt, Israel, Jordan, or Syria to be tortured. Interrogators also told the 15-year old O.K. that Egyptians would send "Soldier No. 9" to rape him. On one occasion, O.K. was short shackled in various painful positions over an extended period of time; he urinated on himself. Military Police (MP) poured pine oil on the floor and dragged O.K.-still shackled-on his stomach through the mixture.

- Before he was taken to Guantánamo, German resident Murat Kurnaz was tortured by U.S. forces in Afghanistan who applied electric shocks to his feet, hung him by his hands for days at a time, and repeatedly subjected him to waterboarding. Mr. Kurnaz witnessed the brutal beating by soldiers of another prisoner who was left bleeding severely from his head wounds. Mr. Kurnaz believes the prisoner died as a result of the beating.

- When Bosnian Lakhdar Boumediene went on a hunger strike to protest his brutal treatment, a nurse administering intravenous (IV) fluid to him threatened to have a soldier administer the IV the next day if Mr. Boumediene did not eat. The following day, she made good on her threat, and a soldier was directed to administer the IV. Mr. Boumediene's arm was in extreme pain and bleeding as the soldier attempted to administer the IV. On another occasion, interrogators threatened to shave Mr. Boumediene and apply lipstick to him to make him look like a woman.

- Abd Al Malik Al Wahab of Yemen was told by interrogators that he would be taken "underground" and never again allowed to see the sun; that if taken to the U.S. he would be "put . . . in a jail with all blacks".

RE 60 (Khadr)
Page 31 of 38

who "will do whatever they please to you" and "nobody will help you"; that he would be taken to "Egypt and Jordan, and they will torture you"; and that he would be raped by a male at Guantánamo. Interrogators also threatened Mr. Al Wahab's family, telling him the military could "reach them if it wanted."

- On approximately April 27 or 28, 2002, Juma Al Dossari was choked and beaten in his cell by MPs and lost consciousness. He was carried from his bloodied cell on a stretcher. The military videotaped the incident. When Mr. Al Dossari later asked the MP who had beaten him why he had done so, the MP replied, "because I'm a Christian."
- During an interrogation of Abdullah Al Noaimi, Mr. Al Noaimi was injected with an unknown substance that caused him to lose the ability to control his thoughts. Interrogators then asked if he wanted to hurt himself, and if he wanted to be shot.
- Guantánamo prisoners routinely have been subject to beatings, extreme sleep deprivation, humiliation, short shackling, intimidation by dogs, extended periods of solitary confinement, withholding of medical care, and temperature extremes in connection with interrogation.
- As confirmed in findings released yesterday in the Schmidt Report, military officials impersonated FBI agents and State Department officials. Prisoners also have reported that interrogators impersonated lawyers, in an effort to gain information.

CCR President Michael Ratner stated, "Such denials have damaged the standing of the United States and placed our soldiers at risk abroad. The Senate Armed Services Committee must establish an independent investigation to reestablish the integrity of the U.S. military and restore the standing of the United States in the international community. When our military ignores the concerns of even the FBI, we are left with no choice but an independent investigation."

CCR Deputy Legal Director Barbara Olshansky stated, "These widespread practices in U.S. detention facilities throughout the world are not the acts of rogue soldiers. At best, the military is simply incapable of self-policing; at worst, our military's leadership is engaging in a deceptive cover-up to avoid command responsibility. The American public cannot tolerate either."

Muneer Ahmad, CCR Cooperating Counsel from American University, stated, "When I learned about the abuse, and saw the conditions at Guantánamo, I realized that our military is engaging in a gross deception. The young man I represent who was only 15 when he was taken into U.S. custody is being held indefinitely under circumstances that have caused severe psychological damage. All of this has occurred outside the bounds of existing military law. Our government must get to the truth of what is happening in Guantánamo-we need an immediate independent investigation of the facts."

###

5 of 26 DOCUMENTS

National Post (f/k/a The Financial Post) (Canada)

January 10, 2006 Tuesday
Calgary Edition

SECTION: NEWS; Pg. A1

LENGTH: 1045 words

HEADLINE: World invited into Guantanamo court: Canadian teen's hearing to proceed despite challenges

BYLINE: Sheldon Alberts, CanWest News Service

DATELINE: U.S. NAVAL BASE, Guantanamo Bay, Cuba

BODY:

U.S. NAVAL BASE, Guantanamo Bay, Cuba - The most controversial courthouse in the world sits atop a low hill in a drab two-storey building surrounded by grass and shrubs turned brown under the Caribbean sun.

Beyond two security perimeters, where armed guards search visitors for explosives and illegal weapons, inside a room recently made plush with burgundy leather chairs and wood-panelled desks, 19-year-old Omar Khadr will finally have his day in court.

The Toronto-born teenager, captured in July, 2002, on an Afghan battlefield is scheduled to appear before a U.S. military commission tomorrow to face charges of murder by an unprivileged belligerent, attempted murder, conspiracy and aiding the enemy.

But even as Canadian and international media arrive at this heavily secured compound for Mr. Khadr's pre-trial hearing, a Supreme Court challenge over the legality of the Bush administration's military tribunals has cast doubt on whether the alleged al-Qaeda fighter's case will ever come to a full trial.

"The proceedings that are scheduled for Wednesday should not take place. We should not be here," said Ben Wizner, a staff attorney for the American Civil Liberties Union, one of several human rights groups protesting Mr. Khadr's hearing. "While serious questions hang over the commissions like a cloud, we shouldn't be going forward with any proceedings until the highest court in our land has ruled."

Lawyers for Mr. Khadr contend international law forbids the United States from trying him because he was a 15-year-old juvenile at the time of his alleged crimes.

They also claim Mr. Khadr was tortured at Camp Delta, the maximum-security prison at Guantanamo where the U.S. is holding 500 "enemy combatants." Any confession or incriminating evidence obtained during torture should not be allowed to be introduced in court, Mr. Khadr's supporters say.

But the biggest challenge to Mr. Khadr's case — and that of eight other detainees charged to date — will come this year when the U.S. Supreme Court hears arguments that the tribunals are illegal.

The court will hear arguments that U.S. President George W. Bush overstepped his constitutional authority and created the tribunals in 2001 without consulting Congress or the U.S. judiciary.

Hearings for two other detainees — Salim Hamdan, Osama bin Laden's former driver, and alleged Australian terrorist David Hicks — have already been delayed pending the Supreme Court case.

But military officials have decided to proceed against Mr. Khadr despite the legal uncertainty and reject charges that his trial will be unfair.

"The military commissions provide for a full and fair trial," said Air Force Major Jane Boomer, a spokeswoman for the tribunal.

"In the military commission process, the accused is entitled to a number of protections."

Mr. Khadr is being represented at the hearing by a military lawyer, Army Captain John Merriam, and a civilian attorney, American University professor Muneer Ahmad. Mr. Khadr's Canadian counsel, Dennis Edney, has not been granted status as a foreign attorney consultant. But the commission says Mr. Khadr's "legal safeguards" include the right to call witnesses and cross-examine witnesses and to refuse to testify. They are the "the same protections used in U.S. federal courts," Maj. Boomer said. The pre-trial will mark the first time since Mr. Khadr's capture that the teenager will be seen by anyone other than the U.S. military, his U.S. lawyers, Canadian intelligence agents and officials from the Foreign Affairs department.

The most recent photographs of Mr. Khadr show a fresh-faced teenager in the full bloom of adolescence.

But he was badly wounded in the eye during a firefight with U.S. troops outside of Khost in southeastern Afghanistan.

Reporters will be allowed inside the courtroom for Mr. Khadr's hearing, but the media is forbidden from taking photographs or videos of the teenager. At past tribunal hearings, media sketch artists were not allowed to draw any facial features on the defendants.

During Mr. Khadr's detention at Guantanamo, he claims interrogators threatened him with rape, held him in stress positions, forced him to soak in his own urine, doused him in Pine-Sol and used him as a human mop.

Mr. Khadr went on a two-week hunger strike last fall to protest his detention, along with dozens of other prisoners. The number of hunger strikers at Camp Delta spiked to more than 80 on Christmas Day and currently 43 are refusing meals.

Many of the hunger strikers have been force fed through a tube to keep them alive, some for several months, said Lieutenant-Colonel Jeremy Martin.

Torture charges by other detainees have triggered a massive effort by the Bush administration to improve the international community's image of Guantanamo.

More than 400 news organizations have been given tours of Camp Delta and base public affairs officers host between four and eight journalists a week to view more modernized accommodations at the prison.

"You have people that claim torture. You have people that claim abuse, that we are putting bad food out, bad water ... All I can say is, 'Consider your source,' "said Major Jeff Weir, the officer in charge of media relations for Joint Task Force-Guantanamo. "We don't torture ... But until somebody comes down here and goes through the camps and sees the guards and sees how we do everything, [those charges] are going to be out there. So we keep inviting people down, even the people from organizations that say we torture."

The Canadian government will have a legal observer from the Foreign Affairs department present at Mr. Khadr's hearing. But Ottawa is coming under criticism from human rights groups for failing to take a tougher stand against the U.S. tribunals.

While Great Britain refused to allow British nationals to face the commissions, Canada has not declared the tribunals illegitimate.

"The British government took the stance that none of their citizens would be tried by the military commissions unless changes were made to bring them in line with fair trial standards," said Jumana Musa with Amnesty International.

"We know that all the British citizens have gone home [but] the Canadian government has not come out publicly, as the British government did, and said, 'You cannot try our citizen.' "

LOAD-DATE: January 10, 2006

REDACTED VERSION
(ORIGINAL FILED WITH CSO)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. 04-1136 (JDB)
	)	
GEORGE W. BUSH,	)	
President of the United States,	)	
et al.,	)	
	)	
Respondents.	)	

DECLARATION OF [redacted]

Pursuant to 28 U.S.C. ' 1746, I, [redacted], hereby declare:

1. I am a Special Agent with the Criminal Investigation Task Force ("CITF") of the United States Department of Defense. Since June 2003, I have been assigned to CITF's Major Case Branch. Since June 2003, I have been the Case Agent assigned to the cases of several Guantanamo detainees. In December 2003, I became the case agent for the case of O.K., the petitioner in this case. I have personal knowledge of the matters stated herein, and, if called to testify, could and would testify competently thereto.

2. In my capacity as the CITF Case Agent for O.K., I have conducted three interviews of O.K. at Guantanamo.

3. The first of the three interviews was on 19 May 2004. This was a session in which I became acquainted with O.K. for the first time. During this interview, I asked O.K. how he was being treated. He complained that he was not receiving mail and that he had lost weight since arriving at Guantanamo. However, he said he was being treated well by the guards and

mentioned that he sometimes volunteered to translate between English and Arabic for the guards and other detainees. He did not mention any incidents of mistreatment or abuse while at Guantanamo.

4. The second time I interviewed O.K. was on 7 December 2004. This interview, which I conducted with my partner Special Agent [redacted], began at about 9:00 a.m. and lasted about one-and-a-half hours. The atmosphere of the interview was friendly, civil, non-adversarial, and O.K. was cooperative. For example, much of the session consisted of O.K. watching and replaying a video that I had brought on my laptop computer of the documentary, "Son of Al Qaida" appearing on the PBS program Frontline. The documentary showed video of his brother and other family members. He was grateful for seeing the video and said that it was the nicest thing anyone had done for him in a long time. He asked why we had not brought him any food to eat, which I had done the last time I visited him. I explained to him that my understanding had been that he was fasting. He said that he was fasting every other day, but that 7 December was his day to eat. He then said he would switch his days so that he could eat on 8 December so we could bring him food during our follow-up session the next day.

5. The third and final time I interviewed O.K. was on 8 December 2004. This interview was also conducted with my partner Special Agent [redacted]. It began at about 2:20 p.m. and lasted about three hours. This interview was also friendly, civil, non-adversarial, and O.K. was cooperative. I brought him a McDonalds meal to eat, which he ate and he also ate the meal I had brought for myself. He said he appreciated both meals. Later in the interview, we looked at car magazines together and talked about cars. At the end of the interview he said he looked forward to seeing us again. We had originally scheduled additional interviews

of O.K. on 9 December and 10 December, but we finished on 8 December and did not conduct any additional interviews thereafter.

6. I have read an allegation by O.K.'s lawyer that during the course of the first two days of interviews from 7 December 2004 to 10 December 2004, "the interrogators threatened to strip Petitioner to only his undershorts if he did not 'confess' to various acts his interrogators accused him of." This allegation is patently false. At no time during either the interview on 7 December or 8 December did I make any such threat or say anything that could possibly be interpreted as such a threat. At no time during either the interview on 7 December or 8 December did my partner Special Agent [redacted] make any such threat or say anything that could possibly be interpreted as such a threat. During the entire time Special Agent [redacted] had contact with O.K., I also was present. The subject of clothing, undershorts, or stripping simply never came up. As mentioned above, the atmosphere of the interview was amicable during both sessions.

7. I do not recall there being anything unusual about the air conditioning or temperature during the 7 December 2004 and 8 December 2004 interviews. O.K. did not complain about the temperature during either of those sessions.

8. During the 7 December 2004 and 8 December 2004 interviews, I did not bring up the topic of this habeas litigation or of O.K.'s meetings with his lawyers, nor would I have considered it appropriate to broach that topic. At one point O.K. mentioned his conversations with his lawyers in the course of explaining to us that he had learned about the present circumstances and whereabouts of various family members through what his lawyers had told him. I did not probe that subject because I did not consider it appropriate. Other than that one

time, the subject simply did not come up in our conversations.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 11, 2005

[redacted]

Filings Inventory - US v. Khadr v5

[redacted] 12 Jan 06

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 4: Motion for Order Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements	12 Jan 06	12 Jan 06		• Motion filed. • A. Response filed.	OR – 55 A - 60
				•	
				•	
				•	
				•	
				•	
				•	

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 - Scheduling and Docketing	• Email of 2 Dec announcing first session of week of 9 Jan, 2 Dec 05 • A. Email to remind counsel to respond to PO 1, 7 Dec 05 • B. CPT Merriam's response to PO 1 and POs reply, 8 Dec 05. • C. Prof Wilson's Response to PO 1, 8 Dec. • D. Prof Ahmad's Response to PO 1, 8 Dec • E. Prof Ahmad's email for clarification and PO response, 9 Dec • F. Announcement of specific Jan 06 session times, 9 Dec 05. • G POs bio summary for voir dire, 9 Dec 05. • H. Excusing counsel from sessions at GTMO 16 Dec 05	OR - 1 A - 2 B - 13 C - 14 D - 15 E - 16 F - 17 G - 18 H - 19
PO 2 - Discovery	• Discovery Order filed with counsel, 19 Dec 05	OR - 20
	•	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
1	NA	NA	20 Dec 05	Email to counsel to send active protective orders or to request same.	24
3				• Prosecution Request - FOUO - Law Enforcement sensitive • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) •	ORIG – 27 A - 32

[redacted]

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE

[redacted]

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1 - Motion for Continuance Based on SDDC Request (5 Jan 06)	5 Jan 06	XXXX	XXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 36 A – 38
D 2 - Motion to Abate Proceedings of the Military Commission due to MCO No. 1s Fatal Inconsistency with the President's Military Order	5 Jan 06	XXXX	XXXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 37 A - 39
D 3 – Motion in Opposition to the Presiding Officer's Order to Counsel to Appear at an Off-the-Record Conference Pursuant to MCI No. 8, Paragraph 5	10 Jan 06	XXXXX	XXXXX	• Motion filed 10 Jan and denied. Defense to provide APO with missing attachments. • A. Motion denied by PO	OR – 40 A - 41
				•	
				•	
				•	

[redacted]

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
2	Protective Order 1	1	11 Jan 06	• Prosecution Request - Protection of Identities of Investigators and Interrogators. • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed	ORIG – 26 A – 33 B - 45
4	Protective Order 2	2	11 Jan 06	• Prosecution Request - Protection of Identities of all witnesses • A. Defense objection to issuing order at all. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed	ORIG – 28 A – 34 B - 46

RE 62 (Khadr)
Page 1 of 1

LEXSEE 305 F. SUPP. 2D 723

UNITED STATES OF AMERICA, Plaintiff, v. (D-1) KARIM KOUBRITI, (D-2) AHMED HANNAN, and (D-4) ABDEL ILAH ELMARDOUDI, Defendants.

Case No. 01-80778

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

305 F. Supp. 2d 723; 2003 U.S. Dist. LEXIS 22529

December 16, 2003, Decided

DISPOSITION: Attorney general admonished, but not found in contempt.

COUNSEL: [**1] For KARIM KOUBRITI, Defendant: Richard M. Helfrick, Federal Defender Office, Detroit, MI USA. Leroy T. Soles, Federal Defender Office, Detroit, MI USA. Federal Defender, Federal Defender Office, Detroit, MI USA.

For AHMED HANNAN, Defendant: James C. Thomas, Detroit, MI USA. Richard M. Helfrick, Federal Defender Office, Detroit, MI USA. Leroy T. Soles, Federal Defender Office, Detroit, MI USA. Joseph A. Niskar, Detroit, MI USA.

For ABDEL ILAH ELMARDOUDI, aka: Nabil Hayamm, Hussein Mohsen Safiddine, George Labibe, Jean Pierre Tardelli, Abdella LNU, Defendant: William W. Swor, Detroit, MI USA. Margaret S. Raben, Gurewitz & Raben, Detroit, MI USA.

U. S. Attorneys: Richard G. Convertino, United States Attorney's Office, Detroit, MI.

JUDGES: PRESENT: Honorable Gerald E. Rosen, United States District Judge.

OPINIONBY: Gerald E. Rosen

OPINION:

[*724] OPINION AND ORDER REGARDING DEFENDANTS' MOTION TO REQUIRE ATTORNEY GENERAL TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CONTEMPT

PRESENT: Honorable Gerald E. Rosen

United States District Judge

I. INTRODUCTION

This case began just six days after the September 11, 2001 terrorist attacks on [*725] New York and Washington, D.C., when three [**2] of the Defendants were found at an apartment where federal and state law enforcement officials had hoped to locate an individual on the FBI's "watch list" of suspected terrorists or associates of known terrorists. These arrests generated a substantial amount of media coverage, in light of the public emotions aroused in the immediate wake of the September 11 attacks and the link to a man suspected of associating with terrorists. This attention only increased as the Government augmented its initial document fraud charges with more serious terrorism-related charges, and as it began to appear that this might well be (and, in fact, was) the first case to proceed to trial on terrorism-related charges since the September 11 attacks.

Against this backdrop of momentous national tragedy, heightened public and media interest, and the challenge of ensuring a fair trial for individuals of Middle Eastern origin in a case involving allegations of terrorism-related activities, the parties and their counsel quickly and unanimously suggested that the Court enter an order regulating public statements by the parties or their attorneys concerning this case. Thus, in the early days of this case, the Court [**3] issued a stipulated Order Concerning Public Communications by Parties or Lawyers, which was signed by counsel for all parties. Generally speaking, this Order prohibited the public disclosure of information that had a reasonable likelihood of interfering with a fair trial or otherwise prejudicing the proceedings.

This Order generally achieved its purpose, despite a number of challenging developments during the course of these proceedings. Some lamentable incidents did arise, however, and two of the more serious of these directly involved this Nation's highest law enforcement

official, United States Attorney General John Ashcroft. Specifically, the Attorney General referred to this case at two separate press briefings in Washington, D.C., once near the outset of this case and again in the middle of the trial. In the first instance, Attorney General Ashcroft erroneously stated that the three Defendants arrested on September 17, 2001 were "suspected of having knowledge of the September 11th attacks." On the second occasion, the Attorney General referred to a cooperating Government witness who had just completed his trial testimony, opining that this individual's testimony had "been of [**4] value, substantial value" to the Government. n1

> n1 Still another serious incident occurred when a draft version of the Second Superseding Indictment, which added terrorism-related charges for the first time, was leaked to the media before it had been returned by the grand jury. There is no evidence, however, that the Attorney General was involved in this troubling episode. Nonetheless, it has some relevance to the present matter, as discussed below.

Defendants raised contemporaneous and strenuous objections to these incidents, and some immediate prophylactic steps were taken. The Court elected at the time, however, to defer its ultimate disposition of these matters until after the trial, in order to avoid disruption of pretrial preparations and the conduct of the trial itself. Defendants now have renewed their objections, through a formal motion requesting that the Court order the Attorney General to show cause why he should not be held in contempt for violating the Court's Order regarding public communications. [**5] To date, the Court has issued only a more limited Order, directing the Attorney General to show cause in writing why he should not be compelled to appear for a hearing to address Defendants' motion.

As is evident from the foregoing, this matter poses a considerable challenge to [*726] the Court, demanding the reconciliation of a number of important, and sometimes competing, judicial and institutional concerns. First and foremost, it is the duty of this Court to ensure that Defendants have been afforded a fair trial consistent with the guarantees and dictates of our Constitution. Next, it cannot be gainsaid that this or any Court must stand behind its orders and apply them equally to all, without regard for station or title. As a coequal branch of government under this Nation's constitutional design, the judiciary is entitled to the respect of executive and legislative officials, no matter how senior or subordinate. At the same time, however, this Court recognizes that it may not trespass upon or unduly impede the functions entrusted by the Framers to the other branches of government.

As weighty and nuanced as these considerations might be, the present matter ultimately is amenable to resolution [**6] through the process routinely employed by the courts -- namely, the application of the relevant legal standards to the facts of this particular case. The pertinent facts here are largely undisputed, and the governing law is reasonably well settled. For the reasons stated below, the Court finds that the Attorney General's public statements about this case violated the terms of the Court's Order regarding communications, if perhaps only inadvertently. The Court further determines, however, that there is insufficient evidence of willful misconduct or prejudice to the rights of Defendants to warrant the drastic and constitutionally problematic measures of instituting criminal contempt proceedings against the Attorney General or compelling him to appear at a hearing and give testimony concerning his actions.

Nevertheless, in light of the particular circumstances surrounding the Attorney General's conduct, which will be detailed below, the Court finds that it cannot simply ignore repeated violations of its Order. The Attorney General's Office exhibited a distressing lack of care in issuing potentially prejudicial statements about this case, one of which came after senior Justice Department [**7] officials were directly and expressly advised by the Court, on two separate occasions, that the Order had been entered and would be strictly applied to all, including the Attorney General and his staff. In addition, the Court is concerned that, despite the explicit warnings given in this case, the Attorney General apparently did not take sufficient steps to reform the procedures used in his Office, in order to ensure that staff members with significant prosecutorial experience carefully review any proposed references to pending cases to verify that they comport with all applicable ethical guidelines and court orders.

Despite his unquestioned duty to address the Nation on matters of public concern, and his more specific responsibility to keep the Nation informed of the Justice Department's efforts in the war on terror, the Attorney General has an equally vital and unyielding obligation, as the Nation's chief prosecutor, to ensure that defendants are accorded the fair trial guaranteed to them under our Constitution. In this case, this essential balance was jeopardized, even after the Court had issued specific warnings. Accordingly, the Court finds that a public and formal judicial admonishment [**8] of the Attorney General is the appropriate sanction to address this concern.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Circumstances Surrounding the Entry of the October 23, 2001 Order Concerning Public Communications by Parties or Lawyers

In order to place this matter in its proper context, it is necessary to recall the [*727] circumstances that led to the entry of the October 23, 2001 Order, and to recount the several occasions when the Court was called upon to address issues relating to this Order. n2 In the early days of this case, Defendants filed a motion in which they quoted the following statement by Justice Oliver Wendell Holmes:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

(Defendants' 11/29/2001 Motion for Continuance in Light of Excessive and Inflammatory Pretrial Publicity, Br. in Support at 1 (quoting *Patterson v. Colorado ex rel. Attorney General of Colorado, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907)*). This same motion was accompanied [**9] by a list of hundreds of reports in the local, national, and worldwide media regarding Defendants and this case, with nearly all of these articles also mentioning the September 11, 2001 attacks on New York and Washington, D.C.

> n2 In setting forth the background of Defendants' motion, and in its subsequent rulings on the legal issues presented in this motion, the Court has endeavored to rely exclusively on facts which are undisputed in the record. For reasons discussed below, the Court finds it unnecessary and inappropriate to develop a further record in this matter, or to take any additional steps to resolve any factual disputes which might exist in the present record.

Such a juxtaposition was to be expected under the circumstances. Three of the four Defendants in this case n3 were apprehended just six days after September 11, by Detroit Joint Terrorism Task Force agents who were looking for Nabil Al-Marabh, an individual listed on an FBI "watch list" of people suspected to be involved in some way in terrorist [**10] activities. The agents sought to interview Al-Marabh as someone who might have knowledge regarding the September 11 attacks, and the apartment where they sought him, at 2653 Norman Street in Detroit, Michigan, listed Al-Marabh's name on the mailbox.

> n3 In the course of the several indictments issued in this case, certain defendants have been added and others have been removed. When this case went to trial in March of 2003, the three above-captioned individuals remained as Defendants, along with Farouk Ali-Haimoud. The jury returned a verdict on June 3, 2003 acquitting Defendant Ali-Haimoud on all charges, while the other three Defendants were convicted on one or more counts of the third superseding indictment. These three remaining Defendants brought the motion presently before the Court.

Upon arriving at the Norman Street residence, the agents did not find Al-Marabh, but instead were greeted at the door by Defendant Karim Koubriti. Mr. Koubriti gave permission for the agents to follow him inside the apartment, [**11] where Defendants Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud were found to be living as apparent transients, with no furniture to speak of and their clothing kept in duffel bags, suitcases, and garbage bags. A search of the premises revealed several suspicious items, including fraudulent passports, visas, social security cards, and alien registration cards. The agents also discovered a day planner which contained references to an American military base in Turkey, an "American foreign minister," and a Jordanian airport, as well as sketches which purportedly depicted airport flight lines, aircraft, and runways. In addition, two SkyChef/Detroit Metropolitan Airport badges were found in the apartment, bearing the pictures of Defendants Koubriti and Hannan.

Against this backdrop, certain practical concerns were evident to the parties and the Court alike. In the immediate wake [*728] of September 11, terrorism task force agents had apprehended three young men of Middle Eastern origin in an apartment previously occupied by an individual on the FBI's "watch list" of people suspected of terrorist ties. A number of suspicious items, including fraudulent identification papers, had also been found [**12] in this apartment. It was inevitable, under these circumstances, that media reports of Defendants' arrest and indictment would be accompanied by references to the September 11 attacks. This, of course, suggested the very real danger that the potential pool of jurors would associate Defendants with the tragic events of that day.

Yet, the Government has *never* alleged, either at the outset or at any other point in these lengthy proceedings, that these Defendants had any connection whatsoever to the terrorist attacks on New York and Washington, D.C. Nor did any of the evidence offered at trial even suggest such a link. Indeed, the initial indictment in this case charged Defendants solely with document fraud. The first charges and allegations of terrorism-related activities did not appear until the grand jury returned the Second Superseding Indictment on August 28, 2002, nearly a year after Defendants Koubriti, Hannan, and AliHaimoud were taken into custody.

The demographics of the greater Detroit area posed an additional concern. In the wake of September 11 and the publicity surrounding Defendants' arrest, tensions and sensitivities were extremely high in this area, a community [**13] which includes the largest Middle Eastern population outside of the Middle East. This raised the prospect that this case might become a focal point in the escalating community debate about larger social and political issues.

It was immediately apparent to the Court and counsel, therefore, that a number of steps were necessary to "lower the volume" concerning this case, in order to ensure that it was tried in court rather than the media and that prospective jurors did not form preconceived notions that might jeopardize Defendants' right to a fair trial. Various such measures have been employed throughout these proceedings, including the preparation of a detailed 26-page questionnaire to explore the attitudes of prospective jurors and their awareness of the media reports about this case, extensive individual voir dire of each prospective juror, and the empaneling of an anonymous jury. See *United States v. Koubriti, 252 F. Supp. 2d 424, 426-27 (E.D. Mich. 2003)* (describing the questionnaires given to prospective jurors); *United States v. Koubriti, 252 F. Supp. 2d 418, 419-20 (E.D. Mich. 2003)* (addressing the selection of an anonymous jury).

In addition, [**14] in the very early days of this case, the parties and the Court quickly agreed upon the terms of a "gag order" governing public communications about this case. At an initial status conference convened shortly after Defendants were arrested and initially charged, counsel for both the Government and Defendants suggested that such an order would be appropriate, and the Court readily agreed. The Court then invited counsel to draft and agree upon the language of this proposed order, and they returned within a few days to present their proposal.

Counsel's suggested language was incorporated, essentially without alteration, into the October 23, 2001 Order that forms the basis for Defendants' present motion. This "Order Concerning Public Communications by Parties or Lawyers" is quite brief, and provides in its entirety:

> Upon agreement of the Defendants and their attorneys and the attorneys for the Government, and to prevent the reasonable likelihood of prejudicial pretrial [*729] publicity and to protect the due administration of justice, it is ORDERED that:
>
> A. None of the lawyers appearing in this case or any persons associated with them will release or authorize the release of information [**15] or opinion about this criminal proceeding which a reasonable person would expect to be disseminated by any means of public communication, if there is a reasonable likelihood that such disclosure will interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice.
>
> B. All counsel shall take reasonable precautions to prevent all persons who have been or are now participants in or associated with the investigations conducted by the prosecution and defense from making any statements or releasing any documents that are not in the public record and that are reasonably expected to be publicly disseminated which would be likely to materially prejudice the fairness of this criminal proceeding.

(10/23/2001 Order at 1-2.) This stipulated Order was signed by counsel for the Government and for all Defendants who were then in the case, was promptly entered by the Court, and has remained in effect at all times from October 23, 2001 until the Court vacated it at the close of trial in June of 2003.

B. The Court's Efforts to Enforce the October 23, 2001 Order

Through their present motion, Defendants assert that the Attorney General has [**16] violated the October 23, 2001 Order on two occasions, first within a few days after its entry, and then again during the trial in the spring of 2003. In addition, other incidents arose during the course of these proceedings that have implicated the terms of this Order, requiring the Court to convene conferences and correspond with counsel regarding these matters.

1. The Attorney General's Reference to This Case at an October 31, 2001 Press Briefing

The first such incident occurred just eight days after the Order was entered, at a Washington, D.C. press briefing held by the Attorney General on October 31, 2001. At this news conference, the Attorney General gave a progress report on the "war on terror" that had been commenced following the September 11 attacks, announcing various steps that the Department of Justice had taken "to enhance our ability to protect the United States from the threat of terrorist aliens." (Government's Response, Ex. A, 10/31/2001 Briefing Tr. at 1.) These steps included the formation of a Foreign Terrorist Tracking Task Force, the implementation of measures authorized under the recently-enacted USA Patriot Act, and the designation of various groups [**17] as terrorist organizations under the Act. As a preface to his more specific remarks on these subjects, the Attorney General stated:

> Forty years ago, the Department of Justice, under Attorney General Robert Kennedy, undertook an extraordinary law enforcement campaign to root out and to dismantle organized crime. The Kennedy Justice Department, it is said, would arrest a mobster for spitting on the sidewalk, if it would aid in the war against organized crime.
>
> In the war on terror, it is [the] policy of this Justice Department to be equally aggressive. We will arrest and detain any suspected terrorist who has violated the law. If suspects are found not to have links to terrorism or not to have violated the law, they'll be released. But terrorists who are in violation of the law will be convicted, in some cases be [*730] deported, and in all cases be prevented from doing further harm to Americans.
>
> Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks. It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism.
>
> Three Michigan men suspected of having knowledge of the September [**18] 11th attacks, for example, were arrested on charges of possessing false documents. In addition to a day planner containing notations in Arabic and what appeared to be a diagram of an airport flight line, agents found false immigration forms, a fraudulent U.S. visa and a false alien identification card in the apartment of the three men.

(Id.)

These statements about Defendants were prominently reported in both the local and the national media. Concerned that these remarks might violate the prohibition on prejudicial public communications about this case, the Court immediately convened a November 2, 2001 *in camera* off-the-record conference with the U.S. Attorney for this District, defense counsel, and then-Assistant Attorney General Michael Chertoff, the head of the Justice Department's Criminal Division. Through this measure, the Court sought to alert the Attorney General, the members of his staff, and all counsel of record in the case that the October 23, 2001 Order must be adhered to and would be strictly enforced. The Court also sought to swiftly rectify any prejudice to Defendants as a result of the Attorney General's comments and the ensuing publicity, by urging [**19] the Justice Department to immediately make clear that the Government lacked any evidence linking Defendants to the events of September 11. At the same time, the Court deemed it more appropriate at the time to address this matter in a non-public, off-the-record conference rather than a formal proceeding, in order to prevent this seemingly isolated incident from itself becoming a spectacle, and thereby diverting the attention and resources of the parties, counsel, and the Court away from the preparation of this case for trial.

During the course of this November 2, 2001 conference, Assistant Attorney General Chertoff stated that he understood the Court's concerns, apologized for any disruption in the proceedings as a result of the Attorney General's remarks, and represented that no further such incidents would occur during this case. The Court, in turn, instructed Mr. Chertoff to take steps to ensure that the Attorney General and his staff were fully apprised of the terms of the October 23, 2001 Order and the importance of avoiding any further public comments that might run afoul of this Order.

In addition, the Court addressed the potential prejudice to Defendants by urging Mr. Chertoff [**20] to pursue the release of a Justice Department statement specifically retracting the Attorney General's remark that Defendants were "suspected of having knowledge of the September 11th attacks." The Department issued a press release that very same day, stating that "at this time the Department of Justice does not take the position that the three Michigan men had knowledge of the September 11 events." (Government's Response, Ex. B, 11/2/2001 DOJ Statement.)

2. Events Surrounding the Return of the Second Superseding Indictment

Over the next several months, there were no further disclosures or statements implicating the terms of the October 23, 2001 Order. During this time, the Government continued its investigation, and [*731] indicated through counsel that it would soon determine whether to pursue a superseding indictment that would include terrorism-related charges. This process culminated in the Second Superseding Indictment, which was issued on August 28, 2002, and which charged for the first time that Defendants had provided material support or resources to terrorists.

Upon learning of this impending indictment and its terrorism-related charges, n4 the Court anticipated that there [**21] might be heightened media and public attention to this case, as well as increased demand for counsel to comment upon this development. Accordingly, on the morning of August 28, 2002, the date the indictment was expected to be (and ultimately was) handed down, the Court delivered to all counsel a letter reminding them of the obligations imposed under the October 23, 2001 Order:

> The Court has been advised by the Government that it will be seeking a superseding indictment today which will include terrorist-related charges. The Court has also been advised that the Government will be issuing a press release with the anticipated superseding indictment.
>
> In view of the "gag" order in place in this case -- and in anticipation of a return of a superseding indictment -- I instructed the Government to provide me with a copy of the proposed press release. I have now reviewed the press release to insure that it is purely descriptive of the charges in nature. No press conference is to be held in conjunction with a return of the superseding indictment or press release.
>
> Should the superseding indictment issue, I have also instructed the Government to provide all defense lawyers with copies of [**22] the superseding indictment and press release prior to release to the media. In addition, I will permit defense counsel to respond to the media concerning the superseding indictment and press release in a limited, non-inflammatory manner.
>
> Under no circumstances should any attorney or party contact the media prior to any issuance of a superseding indictment by the Grand Jury.
>
> I instruct all counsel and parties to use restraint and caution in responding to media inquiries concerning the superseding indictment and the case in general, and remind counsel that, although I have permitted this limited media comment, the gag order remains in place.

(8/28/2002 Letter to Counsel at 1-2.)

> n4 Specifically, the Assistant United States Attorney serving as the lead prosecutor in this case, Richard Convertino, contacted the Court in the afternoon of August 27, 2002, to advise that the indictment likely would be issued the next day.

Beyond attempting to anticipate and forestall any untoward public comment about the impending [**23] indictment and its terrorism-related charges, the Court's letter to counsel also was motivated by a specific and highly troubling incident. On the evening of August 27, 2002, the ***day before*** the grand jury handed down this indictment, a Fox television network news reporter announced a "breaking story" about the forthcoming indictment. Strikingly, this nationally televised report included language which was quite similar, if not identical, to the language of the Second Superseding Indictment issued the next day. Apart from the obvious implications to the October 23, 2001 Order, this apparent leak arguably violated *Federal Rule of Criminal Procedure 6(e)*, which imposes strict secrecy requirements on grand jury proceedings. n5

> n5 Notably, under subsection (e)(7) of this Rule, a "knowing violation of *Rule 6* may be punished as a contempt of court." *Fed. R. Crim. P. 6(e)(7)*.

[*732] But this was not all. The next evening, after the indictment [**24] had issued, a report aired on an MSNBC nightly news program regarding this case. During this program, an MSNBC news reporter read English translations of select, inflammatory portions of Arabic language tapes that had been seized in the initial raid of Defendants' apartment back on September 17, 2001. These translated passages had not been included in

the indictment and, what is more, they were presented to the viewers as derived from the evidentiary record in this case. Although it is not clear whether the MSNBC reporter had gained access to the tapes actually seized from the apartment or the Government's translations of these tapes, n6 it was at least evident that the reporter had learned something about this case that was not a matter of public knowledge at the time -- namely, that these tapes were among the items seized from Defendants' apartment on the date of their arrest.

n6 Through the evidence introduced at trial, it appears that the tapes found in Defendants' apartment can be obtained without a great deal of effort in various Arabic-speaking communities.

[**25]

Perhaps not surprisingly, given these leaks that apparently came from Government sources, n7 and in light of the serious terrorism-related charges contained in the Second Superseding Indictment, one of the defense attorneys elected to speak out to the local and national media in a fashion that did not comport with the Court's admonition to "use restraint and caution" in public comments concerning the indictment. n8 This attorney stated to the Detroit media, for example, that the charges against his client were based on the "uncorroborated briefing of this snitch, [Youssef] Hmimssa," and that "what's kind of scary about this is that basically every Arab person in the country is one snitch away from being on the business end of a terrorism indictment." David Ashenfelter, *Prosecutors Seeking New Indictments Against Terror Suspects*, Detroit Free Press, Aug. 28, 2002 (quoting defense attorney Kevin Ernst). In an exercise of admirable professional restraint, however, the remaining defense attorneys refrained from offering any public comments in response to the outpouring of media and public interest surrounding the grand jury's return of terrorism-related charges.

n7 There is no indication, the Court hastens to add, that these leaks originated in the Attorney General's Office. Nonetheless, both the nature and the substance of the leaks would tend to suggest that they are attributable to the Government rather than anyone associated with the defense. It also appears unlikely that the local U.S. Attorney's Office was the source of the leaks, particularly given that the news reports regarding the Second Superseding Indictment and the Government's evidence originated with national reporters based in Washington.

[**26]

n8 This attorney subsequently withdrew from the case and was replaced by court-appointed counsel, but for reasons unrelated to the incidents surrounding the return of the Second Superseding Indictment. It is worth noting, however, that no further action has been sought or taken against this attorney regarding any violation of the Court's October 23, 2001 Order.

Faced with this rash of apparent leaks and public statements concerning the charges and allegations of the Second Superseding Indictment, the Court convened an *in camera* telephonic hearing on October 7, 2002 with the two senior attorneys from the U.S. Attorney's Office for this District, defense counsel, and Deputy Attorney General Lawrence D. Thompson, who appeared on behalf of the Attorney [*733] General's Office in Washington, D.C. n9 At this conference, the Court first recounted the incidents that had occurred to date regarding the October 23, 2001 Order. The Court then addressed the Deputy Attorney General, expressing its concern that "the message didn't get through" at the Court's prior, off-the record conference with then-Assistant [**27] Attorney General Chertoff. (10/7/2002 Conference Tr. at 12.) The Court further stated:

> The reason why I wanted you [*i.e.*, Deputy Attorney General Thompson] to participate was because I know you are very much involved in the policy decisions here. And I'm not implying in any way [that] you are responsible for any of this. I want to quickly add that. But you seem to me to be the person, short of the Attorney General, who could make it clear to everybody in the [Justice] Department, that I view this with the greatest degree of seriousness. And to get that message through, not just to the lawyers and the prosecutors and the agents who are involved, but to the political people as well, because I don't believe they're getting the message.
>
> * * * *
>
> Thus far, all I have done is talk[]. I've tried to make it clear to everybody that I view the gag order not only as important to the administration of this case, and to the parties here to ensure a fair trial, but I believe that it is in the best interest of all

of the parties that this case be conducted in court through formal proceedings, hearings, conferences with the Court, motions, pleadings, and not tried in the media. [**28]

We're heading into a stage in this case in which there -- I've got to make some very difficult decisions . . . . But one thing I have to be certain of, I have to be able to trust counsel . . . . If I cannot, we will not be able to conduct this case.

So, by virtue of this conference, I'm not doing this, as I said, as a formal order to show cause to anybody. But by virtue of this conference, I'm putting everybody on notice [that] there will be no violations. There are no free passes. And Mr. Deputy Attorney General, I hope you will pass that along. If the[re are] any more violations by the Government, . . . I will impose sanctions, which may include a request to the Office of Professional Responsibility to investigate.

I am determined not to make this a public spectacle, . . . because I think that would not serve the overall purpose. Because if we do all this in public, then it raises the profile of the case and it becomes even harder to ensure a fair jury, not just here in Detroit, but anywhere . . . . I didn't initiate the gag order, but I intend to keep it in place until further order of the Court and I intend to enforce it.

(Id. at 12-16.)

n9 This hearing was on the record, but the transcript initially was placed under seal. The transcript subsequently was unsealed by Order dated September 18, 2003.

[**29]

In response to the Court's remarks, the Deputy Attorney General stated that he was "not aware of anyone, any employee of the [Justice] Department, being involved in any pre-indictment leak." (Id. at 17.) Nonetheless, Mr. Thompson assured the Court that he had read the October 23, 2001 Order, and that he would "bring [the Court's] concerns to the attention of the appropriate people here at the Department" and "make certain that we do everything we possibly can to bring to the attention [of] our employees the absolute[] necessity to not only obey all court orders, [but] make certain all defendants receive fair and just trials." (Id.) He further stated that he would confer with the senior [*734] officials in the local U.S. Attorney's Office "to make certain that we've explored all the possibilities in communicating your concerns, Your Honor, and court order to the appropriate people here at the DOJ who may deal with this case [or] who may have knowledge of this case." (Id. at 18.)

Following up on these assurances, the Court requested that the Deputy Attorney General address this matter in a memo "and make sure that this memo is confidentially given circulation, not [**30] just to the folks in the Criminal Division [of the Department of Justice], but anybody who is involved in this case and to the folks in the Attorney General's Office." (Id. at 21.) Deputy Attorney General Thompson agreed, and issued an October 16, 2002 memorandum to the Attorney General's Office and other Department of Justice entities discussing the issues addressed at the October 7, 2002 conference with the Court. n10 Specifically, this memo set forth the terms of the October 23, 2001 Order, noted that the Second Superseding Indictment apparently had been leaked the evening before it was handed down, and observed that "this case has generated a substantial amount of interest, especially in the Detroit area." (10/16/2002 Thompson Memo at 1-2.) The memo closed with the directive that Department employees "avoid making any statement about this case except in strict compliance with the Court's order, applicable rules, and Department policy as set forth in Section 1-7.000 of the United States Attorneys' Manual." (Id. at 2.)

n10 This memo, like the transcript of the October 7 conference, initially was filed under seal, but has since been unsealed.

[**31]

3. The Attorney General's Reference to a Government Witness During the Trial

Following this flurry of activity immediately surrounding the return of the Second Superseding Indictment, trial preparations proceeded over the next several months without public comment by counsel or the parties. A lengthy jury selection process began on February 21, 2003, when prospective jurors were summoned to the Court and asked to complete a detailed, 26-page questionnaire. Among other inquiries, prospective jurors were asked whether they had seen, heard, or read anything about Defendants or this case. If so, the jurors were asked whether what they had learned would prevent them from rendering a fair and impartial verdict based solely on the evidence presented in court.

The jury selection process continued in court on March 18, 2003, when prospective jurors were subjected to extensive individual *voir dire*. Again, some of this questioning concerned pretrial publicity. This lengthy and painstaking process continued for seven days, concluding on March 26, 2003 with the final selection of a panel of sixteen jurors and alternates. That same day, the trial formally began with the opening statements [**32] of the parties.

It is fair to characterize Youssef Hmimssa as one of the Government's key witnesses. Although Mr. Hmimssa was among the Defendants named in the initial indictment, the charges against him were severed because of his agreement to cooperate with the Government and testify against the other Defendants. In all, he testified for five days at trial, including three days of vigorous cross-examination. This testimony directly and specifically detailed various terrorism-related activities engaged in by each of the Defendants. Mr. Hmimssa concluded his testimony on [*735] April 17, 2003, just short of the midpoint of trial.

That same day, April 17, 2003, Attorney General Ashcroft held a press conference in Washington, D.C. to address the Justice Department's efforts to prevent any domestic acts of terrorism arising from the war in Iraq. During the course of his remarks, the Attorney General noted that various individuals had recently been charged with engaging in terrorism-related activities. The Attorney General then stated:

> Also, during this same time, the Justice Department took guilty pleas from four individuals who are providing cooperation to the United States as part of [**33] their plea agreements. I want to emphasize the value of the guilty pleas with agreements to cooperate. The information in a guilty plea obviously assists us in detaining and disrupting the activities of those who are not associated with the plea. The person pleading guilty goes to jail, but the information helps us disrupt activities of others who are not a party to that particular litigation.
>
> Ernest James Ujaama in Seattle pled guilty to providing goods and services to the Taliban.
>
> Two defendants in Buffalo pleaded guilty for providing material support to al Qaeda.
>
> And Youssef -- I'm having trouble with this one -- Youssef Hmimssa pled guilty to multiple criminal charges and is currently cooperating in the Detroit cell case. His testimony is -- has been of value, substantial value, in that respect.
>
> Our -- such cooperation is a critical tool in our war against terrorism, and when those who may be contemplating terrorist activity are aware of the fact that there are others who had been involved in the terrorist network who are cooperating and providing information, we believe that is a destabilizing, disrupting influence on any who might be seeking to engage in terrorist acts.

[**34]

(Government's Response, Ex. C, 4/17/2003 Press Conference Tr. at 3-4.) This press conference apparently was televised, and the Attorney General's comments about Youssef Hmimssa were widely reported in the Detroit media.

The following morning at trial, Defendants immediately moved for a mistrial, on the ground that the Attorney General had improperly attempted to bolster the credibility of a Government witness. Defense counsel further expressed the intention to seek an order to show cause why the Attorney General should not be held in contempt of Court, but no formal motion actually was made at the time.

In response to the motion for mistrial, the Court first addressed the jury regarding another, unrelated matter, and then questioned the jury as follows:

> The second issue that I want to raise with the jury is -- relates to my ongoing admonition to you not to read anything about the case, not to watch anything on television about the case, not to listen to anything on the radio about the case. My question to you is, in the last day or so, have any of you either heard directly, even though inadvertently, anything in the media or read anything in the paper about any government [**35] official commenting on any of the issues or any of the people or any of the witnesses involved in this case? Any government official whatsoever? Any of you heard anything in the radio, seen anything on television, read anything in the paper about any government official commenting about any of the issues in this case or any of the people or witnesses in this case?

(4/18/2003 Trial Tr. at 3641-42.) The jurors were asked to raise their hands if [*736] their response was affirmative, and none did so. Both the Government and defense counsel were then offered an opportunity to conduct further *voir dire* on this matter, and neither side elected to do so. Based on the jury's response, the Court denied Defendants' motion for mistrial for lack of a showing of prejudice.

Regarding defense counsel's reference to the issue of contempt, the Court stated that any such motion by Defendants would be addressed following the trial. The Court then added:

> Suffice it to say, given all of the history here, . . . I was distressed to see the Attorney General commenting in the middle of a trial about the credibility of a witness who has just gotten off the stand. I believe the Attorney General is [**36] subject to the orders of this Court, [and] I believe the Attorney General believes he's subject to the orders of this Court.
>
> . . . Much more concretely, much more specifically, the Attorney General has been specifically put on notice about the Court's view of the scope of its gag order[] [and] the Court's belief that the Attorney General is subject to the gag order[]. And the Court's specific indication to all Justice Department employees subject to the gag order, including the Attorney General, that they were not to comment on the merits or substantive issues involved in the case.
>
> I am concerned that the Attorney General's comment about the credibility of a witness in the middle of trial could potentially implicate the conditions of the gag order.
>
> I would only restate that which I've said many times before. The Court entered this gag order at the inception of the case at the request of the parties; all of the parties, including the Justice Department. I think it's worked, with some minor glitches, I think it's worked to the benefit of all of the parties. Before the order was entered, I specifically asked all attorneys to review the terms of the gag order with all of their [**37] clients. I was advised that was done. I then did it, again, on a number of other occasions and I was advised that that was done. So I am concerned and distressed to wake up this morning to find the Attorney General commenting on the testimony of a witness that has appeared in this case during trial.

(4/18/03 Trial Tr. at 3635-37.)

Later that day, a Justice Department spokesperson addressed the Attorney General's remarks at his April 17 press conference. The spokesperson stated that "this was a wide-ranging press conference discussing many different matters in the public record," and that "we certainly had no intent to contravene the judge's wishes regarding publicity." David Ashenfelter, *Judge Wants Ashcroft Out of Terror Trial*, Detroit Free Press, April 19, 2003 (quoting a DOJ spokesperson).

Following this incident, the parties continued presenting their proofs for several more weeks, and counsel gave their closing arguments on May 20, 2003. The jury deliberated over seven days, and returned its verdict on June 3, 2003. One Defendant, Farouk Ali-Haimoud, was acquitted on all charges. A second, Ahmed Hannan, was convicted solely on a document fraud conspiracy charge. [**38] The two remaining Defendants, Karim Koubriti and Abdel-Ilah Elmardoudi, were convicted on both the document fraud conspiracy and terrorism-related charges.

C. Procedural Background of the Present Motion

Defendants brought the present motion on August 28, 2003, requesting that the Attorney General be required to show cause why he should not be found to have [*737] violated the Court's October 23, 2001 Order. Upon reviewing this submission, the Court issued an August 29, 2003 Order directing the Attorney General to address the threshold question whether he should be required to personally appear at a hearing on Defendants' motion. The Government responded to the Court's Order on September 12, 2003, arguing that the Attorney General should not be compelled to appear because, as a matter of law, he had not willfully disobeyed the October 23, 2001 Order as necessary to warrant contempt proceedings. n11 On September 22, 2003, Defendants filed a reply in further support of their motion.

> n11 Though the Court's August 29, 2003 Order called for a response from the Attorney General, the Government's response was submitted by the U.S. Attorney for this District, Jeffrey Collins. This submission was unaccompanied by any sort of affidavit or statement from the Attorney General himself.

[**39]

On September 26, 2003, the Court held an *in camera*, off-the-record conference to address various issues raised by Defendants' motion. The U.S. Attorney for this District, his chief Assistant, and all defense counsel were present, as well as two very senior officials from the Attorney General's Office in Washington, D.C. This meeting was intended as an opportunity for those present to express their views on this sensitive and difficult matter with the greatest degree of candor, and to allow for a certain amount of "brainstorming" and open exchange as to the most appropriate way to proceed.

Although, as noted, the Government's response to Defendants' motion was not accompanied by any sort of statement from the Attorney General himself, the Attorney General has now personally addressed this matter in a November 26, 2003 letter to the Court. n12 This letter states:

> With this letter, I hope to address the Court's concerns about two statements that I made over the past two years regarding United States v. Koubriti, et al. I write this not only as the Attorney General of the United States, but also as an officer of the court. The Department of Justice's legal position has been [**40] laid out in the brief that we filed with the Court on September 12, 2003, but I want personally to address your concerns.
>
> This was, of course, a very important terrorism case for our nation and the Department of Justice, and as the Attorney General, I have a duty to keep the American people informed of the Department's progress against terrorism. Even so, I would certainly never want to do anything that could hinder a fair trial or jeopardize the convictions. Your initial Order, which was agreed to by all parties, instructed that persons associated with the case should not make statements about the case if there is a reasonable likelihood that such disclosure would interfere with a fair trial or otherwise prejudice the due administration of justice. In retrospect, I can appreciate how these two statements, however brief and passing, taken either individually or collectively could have been considered by the Court to be a breach of that part of the Court's Order. Let me assure you, however, that my remarks were entirely inadvertent. I had no intent either to disregard the Court's Order or to disrupt the ongoing trial proceedings, much less cause prejudice to the defendants. The statements [**41] at issue were unfortunately included during two of [*738] many press conferences in which I discussed the Department's extensive ongoing efforts in the war on terrorism. I regret making these statements, which resulted in a disruptive impact on the Court's management of the proceedings and had the effect of diverting the Court's and counsels' time and attention from other matters.
>
> I appreciate the Court's painstaking efforts during trial and earlier during voir dire to ensure that no prejudice in fact resulted from the statements at issue. But even if, as set forth in the Department's brief, my remarks did not prejudice the defendants, or were not reasonably likely to do so, I made a mistake in making statements that could have been considered by the Court to be a breach of the Court's Order. And for that I apologize to the Court and counsel.
>
> Please be assured that I have communicated to my staff our need to be more careful when including references to ongoing cases when drafting remarks. I take these matters very seriously and will make every effort to ensure that the difficulties occasioned in this instance will be avoided in the future.

(Attorney General 11/26/2003 Letter at [**42] 1-2.)

> n12 This letter initially was filed under seal, with copies provided to all defense counsel. By Order issued on the date of this Opinion, the Attorney General's letter has been unsealed.

In response to this letter, defense counsel submitted a letter to the Court on December 9, 2003, n13 which states in part:

> It was the position of the defense in this matter that the Attorney General was and is personally responsible for his actions and that his earlier response to our motion was insufficient in that it was not a

personal response. It was merely a pleading filed by a third party. Finally, it has been the position of the defendants that no one really knows whether the jurors were completely candid about their exposure to the public comments by the Attorney General. While there was no actual harm discerned from the jurors in our interviews subsequent to the trial, certainly there was always the potential for harm that we should be concerned with as the case law provides.

A lawyer, who is bound by [**43] the rules of ethics and the Constitution of the United States, should know better than to comment on the testimony of a government witness while a trial is pending. In his personal letter to the Court, the Attorney General attempts to minimize the consequences of his actions. He attempts to deny his intent to interfere by characterizing his comments as inadvertent and, while he assures the Court that he takes these matters very seriously, he does not convince defense counsel that this conduct should not be addressed . . . . Further, to say that he believes that his comments were not reasonably likely to prejudice the defendants sends a message loud and clear that he does not understand the nature of his wrongful conduct or the gravamen of his offensive remarks.

The integrity of the system as a whole is at stake. Mr. Ashcroft's comments were widely reported, both on television and in the news media. They were available electronically and could very easily have been inadvertently discovered by one of the jurors in the case. More importantly, because of the broad coverage, it is extremely likely that jurors' families and friends would happen upon the improper comments and mention them [**44] to a juror in our case.

The Attorney General of the United States has many functions. His perceived function of informing the public conflicts with the defendants' right to a fair trial. How many other trials will [*739] there be during his tenure as the Attorney General? What has been learned? Counsel are not convinced that his apology is sufficient. Furthermore, counsel are not convinced that given the choice between his perceived duty to keep the American people informed, and an individual's right to a fair trial, that he would recognize his sacred obligation to insure that all defendants receive a fair trial without interference.

This Court has discretion as to whether or not to receive the Attorney General's letter as an acceptable response to our motion, and to determine whether his letter is sufficiently contrite and whether his apology is sufficient . . . . Obviously, the question of whether to take this matter further is within the discretion of the Court . . . .

The defendants respectfully request three things if the Court were to make a decision at this time. First, that a finding be made that the Attorney General's conduct is subject to this Court's orders and that it was improper. [**45] Secondly, that there should be a finding that there was no superior duty on the part of an Attorney General that transcended the defendants' right to a fair trial. Finally, that Mr. Ashcroft be, in some fashion, sanctioned for his behavior.

(Defense Counsel 12/9/2003 Letter at 1-3.)

n13 This letter also was initially filed under seal, but has now been unsealed.

Having considered all of these facts, circumstances, and submissions, the Court now is prepared to rule on Defendants' motion. This Opinion and Order sets forth the Court's rulings.

III. ANALYSIS

A. The Law Governing Defendants' Motion

In their motion, Defendants contend that the Attorney General's statements regarding this case at his October 31, 2001 and April 17, 2003 press briefings implicated two of the three subsections of the federal contempt statute, *18 U.S.C. § 401*. This statute provides:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, [**46] such contempt of its authority, and none other, as –

> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401. n14 Because the Attorney General made his statements in Washington, D.C., *subsection (1)* does not apply here. See *Nye v. United States, 313 U.S. 33, 48-52, 61 S. Ct. 810, 815-17, 85 L. Ed. 1172 (1941)* (statutory requirement of misbehavior "in [the Court's] presence or so near thereto" connotes physical proximity). Defendants maintain, however, that subsection (2) is applicable by virtue of the Attorney General's status as an officer of the Court, and that subsection (3) is triggered by the Attorney General's purported violation of the October 23, 2001 Order.

> n14 This statute was amended on November 2, 2002 to insert the "or both" language following "fine or imprisonment." This amendment is not material here, however.

[**47]

As it happens, subsection (2) does not apply here. Admittedly, attorneys often are characterized as "officers of the court" -- and, indeed, the Attorney General himself stated in his November 26, 2003 letter in this case that he was writing "as an officer of the court." Yet, in a decision directly construing the language of *§ 401(2)*, the Supreme Court held that the [*740] term "officers" as used in this provision is limited to "the group of persons who serve as conventional court officers and are regularly treated as such in the laws." *Cammer v. United States, 350 U.S. 399, 405, 76 S. Ct. 456, 459, 100 L. Ed. 474 (1956)*. In so ruling, the Court cited the range of federal statutes governing traditional court officers and employees, see *Cammer, 350 U.S. at 405, 76 S. Ct. at 459* (citing *28 U.S.C. § § 601-963*), statutes which do not encompass attorneys appearing before a court. Accordingly, the Court concluded that lawyers are not court "officers" within the reach of *§ 401(2)*. *Cammer, 350 U.S. at 407-08, 76 S. Ct. at 460*; see also *United States v. Griffin, 84 F.3d 820, 832 n.8 (7th Cir. 1996)*; *United States v. Time, 21 F.3d 635, 641 (5th Cir. 1994)*; [**48] *In re Holloway, 302 U.S. App. D.C. 12, 995 F.2d 1080, 1081-82 (D.C. Cir. 1993)*, cert. denied, *511 U.S. 1030, 128 L. Ed. 2d 190, 114 S. Ct. 1537 (1994)*; *Taberer v. Armstrong World Industries, Inc., 954 F.2d 888, 897 n.10 (3d Cir. 1992)*. n15

> n15 These rulings rest purely on grounds of statutory construction, and are limited to the term "officers" as used in *§ 401(2)*. As such, these decisions do not reflect any broader notion that attorneys cannot be considered "officers of the court" for other purposes. In particular, as discussed below, the Attorney General's characterization of himself as an "officer of the court" in his November 26, 2003 letter has evidentiary significance here.

This leaves only subsection (3) of the contempt statute, which authorizes the Court to punish "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *18 U.S.C. § 401(3)*. By its express terms, this provision is triggered only by "disobedience [**49] or resistance" to a court's order. See *In re Smothers, 322 F.3d 438, 441 (6th Cir. 2003)*. This act of disobedience or resistance must be willful -- that is, a "deliberate or intended violation" of the court's order, "as distinguished from an accidental, inadvertent or negligent violation." *Smothers, 322 F.3d at 442* (internal quotations and citations omitted). In addition, the court's order must be reasonably definite and specific, and the alleged violator must have been on notice of this directive. See *Downey v. Clauder, 30 F.3d 681, 686 (6th Cir. 1994)*; *United States v. Cutler, 58 F.3d 825, 834 (2d Cir. 1995)*; *United States v. West, 21 F.3d 607, 609 (5th Cir. 1994)*.

Though *§ 401(3)* and the relevant case law define the substantive legal standards with reasonable clarity, procedural considerations introduce an additional level of complexity to the present matter. In particular, a contempt proceeding under *§ 401* may be either criminal or civil in nature, and the required procedures are markedly different depending on this "civil" versus "criminal" determination. See *Downey, 30 F.3d at 685-686* [**50] . The Supreme Court has explained:

> "Criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois, 391 U.S. 194, 201, 88 S. Ct. 1477, 1481, 20 L. Ed. 2d 522 (1968)*, and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings," *Hicks v. Feiock, 485 U.S. 624, 632, 108 S. Ct. 1423, 1429-1430, 99 L. Ed. 2d 721 (1988)*. See *In re Bradley, 318 U.S. 50, 63 S. Ct. 470, 87 L. Ed. 608 (1943)* (double jeopardy); *Cooke v.*

> *United States, 267 U.S. 517, 537, 45 S. Ct. 390, 395, 69 L. Ed. 767 (1925)* (rights to notice of charges, assistance of counsel, summary process, and to present a defense); *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444, 31 S. Ct. 492, 499, 55 L. Ed. 797 (1911)* (privilege against self-incrimination, right to proof beyond a reasonable doubt). For "serious" criminal contempts involving imprisonment of more than six months, these protections include [*741] the right to jury trial. *Bloom, 391 U.S., at 199, 88 S. Ct., at 1481*, see also *Taylor v. Hayes, 418 U.S. 488, 495, 94 S. Ct. 2697, 2701-2702, 41 L. Ed. 2d 897 (1974).* [**51] In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-27, 114 S. Ct. 2552, 2556-57, 129 L. Ed. 2d 642 (1994) (footnote omitted). n16

> n16 In a footnote, the Court explained that it was addressing "only the procedures required for adjudication of indirect contempts, *i.e.*, those occurring out of court," in contrast to "direct" contempts that "may be immediately adjudged and sanctioned summarily." *Bagwell, 512 U.S. at 827 n.2, 114 S. Ct. at 2557 n.2.* In this case, likewise, the conduct at issue occurred out of court, so that the standards of "indirect contempt" apply.

As Bagwell acknowledges, "although [**52] the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear." *Bagwell, 512 U.S. at 827, 114 S. Ct. at 2557* (footnote omitted). The Sixth Circuit has provided some guidance on this topic, stating:

> The distinction between civil and criminal contempt lies in the purpose of the court's mandate. Civil contempt sanctions are designed to enforce compliance with court orders and to compensate injured parties for losses sustained. Criminal contempt sanctions, on the other hand, are imposed to vindicate the authority of the court by punishing past acts of disobedience. Accordingly, a fine that is payable to the complainant as compensation for damages caused by the contemnor's noncompliance or that is contingent upon performing the act required by the court's order is civil in nature, while an unconditionally payable fine is criminal.

Downey, 30 F.3d at 685 (internal quotations and citations omitted).

Similarly, Bagwell observes that imprisonment imposed as a contempt sanction is coercive, and hence civil, where "the contemnor is able [**53] to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket." *Bagwell, 512 U.S. at 828, 114 S. Ct. at 2558* (internal quotations and citations omitted). "By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience, such that the contemnor cannot avoid or abbreviate the confinement through later compliance." *Bagwell, 512 U.S. at 828-29, 114 S. Ct. at 2558* (internal quotations and citation omitted).

Here, any sanction potentially faced by the Attorney General under *§ 401(3)* plainly must be characterized as criminal rather than civil. The trial in this case having already concluded, any sanction would not be designed to ensure future compliance with the Court's orders. Nor is there any way, under the circumstances, to meaningfully "compensate" the parties for any "losses" that might have been incurred as a result of the Attorney General's conduct. Rather, any sanction imposed at this juncture would be wholly punitive in nature, designed to "vindicate the authority of the court by punishing past [**54] acts of disobedience." *Downey, 30 F.3d at 685.* Moreover, if it were determined that punishment was warranted under *§ 401(3)*, the Attorney General could do nothing at this [*742] point to "cure" any past violation and avoid this result.

Because any contempt proceeding would be criminal in nature, the process would be governed by *Federal Rule of Criminal Procedure 42(a)*. This Rule provides:

> **(a) Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the

charged criminal contempt and describe it as such.

(2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, [**55] the court must appoint another attorney to prosecute the contempt.

(3) Trial and Disposition. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

Fed. R. Crim. P. 42(a). In addition, as noted earlier, the traditional protections attendant to criminal charges would apply, such as the privilege against self-incrimination and the right to proof beyond a reasonable doubt. With these standards in mind, the Court turns to Defendants' motion.

B. The Court Finds an Insufficient Basis for Charging the Attorney General with Criminal Contempt of Court.

As is evident from the foregoing discussion of the applicable law, a criminal contempt proceeding is an intricate and rigorous process, governed by the stringent procedures demanded in our system of justice [**56] in order to charge and convict a defendant. Where the potential defendant is the United States Attorney General, the Nation's highest law enforcement official, this process becomes considerably more complex, implicating such core constitutional concerns as the separation of powers between the judicial and executive branches. Nonetheless, the Court's duties and inquiries remain the same, and necessarily cannot vary with the station of the individual involved. Upon applying the relevant criminal contempt standards here, the Court concludes that while the Attorney General's statements about this case constituted violations of the October 23, 2001 Order, the record lacks evidence of willfulness that might warrant contempt charges against the Attorney General.

As stated earlier, a contempt charge under *§ 401(3)* requires proof of a willful violation of a reasonably definite and specific court order. The order at issue here, of course, is the Court's October 23, 2001 Order regulating counsel's public communications about the case. Specifically, this Order prohibited the "release of information or opinion about this criminal proceeding which a reasonable person would expect to be disseminated [**57] by any means of public communication, if there is a reasonable likelihood that such disclosure will [*743] interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice." The question before the Court, then, is whether the Attorney General's statements at his October 31, 2001 and April 17, 2003 press briefings concerning matters related to this case constituted willful violations of the October 23, 2001 Order. This inquiry, in turn, has three separate parts: (1) Was the Court's Order reasonably definite and specific? (2) Did the Attorney General's comments, either individually or collectively, constitute a violation of this Order? and (3) Was any violation of the Order willful? The Court addresses each of these points in turn.

1. The Court's Order Was Reasonably Definite and Specific.

As a threshold matter, the Court readily concludes that its October 23, 2001 Order was sufficiently definite and specific to sustain a contempt charge under *§ 401(3)*. The "reasonable likelihood of prejudice" standard set forth in the Order precisely tracks the language of Disciplinary Rule 7-107 of the American Bar Association's Model Code of Professional [**58] Responsibility, the precursor to the ABA's Model Rules of Professional Conduct. Several states have adopted this standard for regulating the public statements of attorneys about pending cases in which they appear, n17 and at least two Courts of Appeals have held that this standard passes constitutional muster. See *In re Morrissey, 168 F.3d 134, 139-40 (4th Cir.)*, cert. denied, *527 U.S. 1036,*

144 L. Ed. 2d 794, 119 S. Ct. 2394 (1999); Cutler, supra, 58 F.3d at 835-836 . n18 Thus, there is nothing inherently unfamiliar or indefinite in the Court's instruction to refrain from public statements that bear a "reasonable likelihood" of prejudice.

n17 At the time of the Supreme Court's decision in *Gentile v. State Bar of Nevada, 501 U.S. 1030, 1068 n.2, 111 S. Ct. 2720, 2741 n.2, 115 L. Ed. 2d 888 (1991)*, eleven states had adopted this standard.

n18 In *Gentile, 501 U.S. at 1075-76, 111 S. Ct. at 2745*, the Supreme Court upheld the constitutionality of the "substantial likelihood of material prejudice" standard set forth in Rule 3.6 of the ABA's Model Rules of Professional Conduct. This same prohibition appears in Rule 3.6 of the Michigan Rules of Professional Conduct, and thus would be applicable here even in the absence of the October 23, 2001 Order. See Local *Rules 1.1(c), 83.22(b)*, U.S. District Court for the Eastern District of Michigan (providing that the Michigan Rules of Professional Conduct apply to attorneys who practice in this District, whether in civil or criminal cases).

The Sixth Circuit has not yet decided whether the "reasonable likelihood of prejudice" standard survives *First Amendment* scrutiny. In *United States v. Ford, 830 F.2d 596 (6th Cir. 1987)*, however, the Court struck down a gag order that prohibited the defendant himself, as well as counsel, from making any public statements whatsoever about the case, beyond a bare assertion of innocence. In so ruling, the Court indicated that only a showing of a "clear and present danger" would warrant such a broad prohibition against a defendant discussing the charges against him. See *Ford, 830 F.2d at 598-600*. The Sixth Circuit has not yet revisited this decision in light of Gentile's holding that the "substantial likelihood of material prejudice" standard is constitutionally permissible.

[**59]

More importantly, the *parties themselves*, both the Government and Defendants alike, proposed the language contained in the October 23, 2001 Order. Then, having offered this language, counsel for the Government and Defendants alike expressly stipulated to the entry of this Order. As set forth earlier, and as further addressed below, the Court and counsel discussed the Order on a number of occasions, with the Court clearly expressing its views as to the sorts of communications that were permissible and [*744] prohibited. Throughout all of this, the Government has never once indicated any uncertainty about the obligations imposed under the Order, not even in response to Defendants' present motion. Nor does the Government challenge the Order as an unconstitutional restraint upon the Attorney General's duty to communicate with the public regarding matters of executive policy. Under these circumstances, indefiniteness provides no defense, and the Government does not contend otherwise.

2. The Attorney General's Statements About the Case Violated the Court's Order.

The next question, therefore, is whether the Attorney General violated the October 23, 2001 Order in his two public [**60] statements about this case. As an initial matter, the Court observes that the Attorney General himself conceded, in his November 26, 2003 letter to the Court, that "in retrospect" he could "appreciate how these two statements, however brief and passing, taken either individually or collectively could have been considered by the Court to be a breach of . . . the Court's Order." (Attorney General 11/26/2003 Letter at 1.) While this may not constitute an express admission that the statements violated the Order, it nonetheless is a direct acknowledgment of the potentially violative and prejudicial effect of these statements. Beyond the Attorney General's own acknowledgment, moreover, additional considerations compel the Court to conclude that its Order was violated.

Specifically, beginning with the October 31, 2001 press briefing, the Attorney General stated on this occasion that the three Defendants arrested on September 17, 2001 were "suspected of having knowledge of the September 11th attacks." As the Government now concedes, this remark "was unfortunately mistaken." (Government's Response at 11.) The Government has never alleged or produced any evidence that Defendants had any involvement [**61] with or knowledge of the September 11 terrorist attacks, and the Department of Justice issued a retraction to this effect shortly after the Attorney General made this comment.

There is ample basis to conclude that this statement violated the October 23, 2001 Order. One can scarcely imagine a stronger condemnation than association with the worst attack ever perpetrated on U.S. soil. This was all the more true at the time of the Attorney General's remarks, just over a month after the tragic events of September 11. To misstate the Government's allegations and evidence on such a highly-charged and emotional issue surely was "reasonably likely" to "interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice" in this case. Indeed, in listing examples of disclosures that are "more likely than

not to have a material prejudicial effect on a proceeding," the commentary to the ABA Model Rules cites the public release of information "that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial." ABA Model Rules of Professional [**62] Conduct, Rule 3.6, cmt. 5.

In arguing that there was no violation, the Government points out (i) that the Attorney General's statement was a passing remark made during the course of a lengthy press briefing, (ii) that this incident occurred nearly 18 months before trial, and (iii) that the Department of Justice issued a retraction just two days later. Viewed in this larger context, the Government contends that the danger of prejudice was minimal. As proof of this, the [*745] Government notes that the extensive individual jury *voir dire* before trial failed to disclose any actual prejudice -- each juror who was selected professed an ability to distinguish between the September 11 attacks and the charges in this case, and none reported having been influenced by any erroneous statement or allegation regarding Defendants' purported knowledge of the attacks. As the Government observes, "evidence that the [attorney]-generated publicity did not in fact taint the jury pool may be relevant to the issue whether those statements were likely to interfere with a fair trial." *Cutler, 58 F.3d at 836* (citing *Gentile, 501 U.S. at 1047, 111 S. Ct. at 2730* (Kennedy, J. [**63] , dissenting in part)).

Yet, Gentile and its progeny cut as much ***against*** the Government's position as for it. Both Chief Justice Rehnquist and Justice Kennedy recognized, for example, that statements made "well in advance of trial" pose less of a danger of prejudice. *Gentile, 501 U.S. at 1079, 111 S. Ct. at 2747* (Rehnquist, C.J., dissenting in part); *501 U.S. at 1044, 111 S. Ct. at 2729* (Kennedy, J., dissenting in part). But their separate opinions ***also*** observed that "damaging" and "highly inflammatory" statements are not so readily cured through the passage of time. *501 U.S. at 1044, 111 S. Ct. at 2729* (Kennedy, J., dissenting in part); *501 U.S. at 1079, 111 S. Ct. at 2747* (Rehnquist, C.J., dissenting in part). As noted, it is difficult to envision a statement more damaging or inflammatory than one which links a criminal defendant to the events of September 11.

Moreover, a statement made even in the early stages of a criminal proceeding can still be quite prejudicial if, for example, it is "timed to have maximum impact, when public interest in the case is at its height immediately after [the defendant] [**64] is indicted." *Gentile, 501 U.S. at 1079, 111 S. Ct. at 2747* (Rehnquist, C.J., dissenting in part); see also *Cutler, 58 F.3d at 837*. A prompt retraction would not necessarily cure this prejudice, because the impact of pretrial publicity "must be judged at the time a statement is made." *Gentile, 501 U.S. at 1047, 111 S. Ct. at 2730* (Kennedy, J., dissenting in part); see also *Cutler, 58 F.3d at 836*. Here, the Attorney General's initial statement was made shortly after Defendants were indicted, and in the immediate aftermath of September 11 when public anxiety and demands for swift justice were at their height. Though the Justice Department is to be commended for its prompt retraction, it is not self-evident that the Department's clarifying statement was as widely distributed and reported as the Attorney General's initial remarks, so that any danger of prejudice was quickly and thoroughly dispelled.

Consequently, the Court finds that the Attorney General's statement at the October 31, 2001 press briefing violated the Court's October 23, 2001 Order. Although it appeared that this statement had been forgotten by the time [**65] of trial, and although the extensive *voir dire* revealed no actual prejudice to Defendants' right to a fair trial, the Court cannot help but conclude that an unfounded statement linking an individual of Middle Eastern origin to the September 11 attacks is reasonably likely to prejudice this individual's subsequent criminal trial. Indeed, everyone involved in this case recognized the prejudicial effect of such a link, and one of the principal aims of *voir dire* was to ensure that jurors did not unfairly associate Defendants with the attacks on New York and Washington, D.C. While this line of inquiry undoubtedly would have been pursued even in the absence of any statement suggesting such a connection, this merely highlights the importance, under the circumstances presented here, of avoiding any remarks that might exacerbate this known concern. [*746] The surrounding context, in short, heightened rather than reduced the likelihood that the Attorney General's statement might interfere with a fair trial.

Turning to the Attorney General's second statement regarding this case, this occurred on April 17, 2003, in the fourth week of an eleven-week trial. That same day, one of the Government's [**66] key witnesses, Youssef Hmimssa, had just concluded his fifth and final day of testimony. At a Washington, D.C. press conference, the Attorney General cited Mr. Hmimssa as one of several examples of cooperating witnesses who had provided assistance in the Government's war on terror. Specifically, the Attorney General noted that Hmimssa had "pled guilty to multiple criminal charges and was currently cooperating in the Detroit cell case," and he stated that Hmimssa's "testimony is -- has been of value, substantial value, in that respect."

The Court finds that these April 17, 2003 remarks, like the statements at the October 31, 2001 press briefing, violated the October 23, 2001 Order. Notably,

the Attorney General's more recent statement, like his earlier one, falls within a category of disclosures deemed "more likely than not to have a material prejudicial effect" in the commentary accompanying the ABA Model Rules. See ABA Model Rules of Professional Conduct, Rule 3.6, cmt. 5 (citing statements relating to "the character, credibility, [or] reputation . . . of a party, suspect in a criminal investigation or witness" as potentially problematic). The witness in question here, Youssef [**67] Hmimssa, was a focal point of the Government's case, and he had just stepped down from the witness stand at the time the Attorney General referred to him. Moreover, it is perhaps an understatement to say that Mr. Hmimssa's credibility was at issue, with defense counsel having just concluded three days of vigorous cross-examination. Against this backdrop, the Attorney General's statement that Hmimssa's "testimony . . . has been of value, substantial value," plainly was "reasonably likely" to "interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice."

In maintaining otherwise, the Government cites many of the same factors addressed above with regard to the October 31, 2001 statement. The Government again notes, for example, that the Attorney General's brief reference to this case was only a small part of a lengthy press conference addressing a myriad of subjects related to the war on terror. The Government further points to the clarification offered by a Justice Department spokesperson the very next day, stating that "we certainly had no intent to contravene the judge's wishes regarding publicity." Moreover, there was little danger, [**68] in the Government's view, that Defendants' fair trial rights would actually be prejudiced, in light of the Court's repeated and strict instruction that the jurors were to avoid reading or viewing any reports or statements about the case. Finally, the Government argues that the statement itself did not reflect any attempt to bolster the credibility of a witness, but rather was a more general observation about the valuable role of cooperating individuals in the war on terror.

Addressing the last of these points first, the Court fails to see how a potentially innocent interpretation renders the Attorney General's statement any less violative of the October 23, 2001 Order. It is perhaps possible that this statement, viewed in the context of the Attorney General's broader discussion about the importance of persons who agree to cooperate, could be construed as highlighting the "substantial value" of Youssef Hmimssa's cooperation, [*747] versus the testimony itself. It is also true, as the Government points out, that the Attorney General's remarks fall short of the "blunt comments" cited by the Sixth Circuit as instances of improper vouching -- a statement by a prosecutor, for example, that "I [**69] think he [the witness] was candid" and "I think he is honest." *United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999)* (internal quotations and citation omitted).

Yet, there is no escaping the brute fact that the Attorney General expressly referred to Youssef Hmimssa's *testimony* as having "substantial value," and that this remark immediately followed the observation that Hmimssa was "currently cooperating" *in this case.* Surely, Hmimssa's testimony would not be of "substantial value" to the Government if the Attorney General did not deem it to be credible. Just as clearly, this testimony would not be of "substantial value" to the Government's efforts in this case unless the jury elected to credit it -- and, significantly, the jury had not yet commenced its deliberations. This sort of statement, then, comes quite close to the second form of improper vouching identified in Francis -- namely, "comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony." *Francis, 170 F.3d at 550.* Consequently, even assuming that [**70] the Attorney General's statement could be given a less problematic interpretation, it is equally or far more likely that it could be construed quite literally as an expression of the "substantial value" of the testimony of a key Government witness in a pending trial. This very real prospect of mischief, in the Court's view, is more than sufficient to trigger the "reasonable likelihood of prejudice" prohibition set forth in the October 23, 2001 Order.

The Government's remaining points require little further discussion. First, it is evident that even a brief remark can violate the October 23, 2001 Order, so long as it addresses a subject of significance that is "reasonably likely" to result in prejudice. Surely, one such topic is the credibility of one of the Government's principal witnesses. Next, the Court again observes that a retraction, however laudable, does not completely remove the taint of prejudice posed by the initial statement. In any event, the "retraction" in this instance did not retreat from the earlier assertion that Hmimssa's testimony had been of "substantial value," but instead addressed the distinct matter of the Attorney General's intent in making his statement. [**71]

Further, by instructing the jurors that they were to avoid any reports about the case, the Court hardly granted a "free pass" for attorneys to say anything they wished, under the premise that jurors were unlikely to hear it. The Court did not, in other words, suspend the operation of the October 23, 2001 Order during the trial, and the Government cannot plausibly maintain that the need for the Order or the risk of prejudice was in any way reduced during this period. In fact, the Court was

required to *voir dire* the jurors to determine if any of them had heard the Attorney General's comments. This, in itself, plainly demonstrates that these remarks had the potential to prejudice Defendants' fair trial rights. The fortuity that the jurors did not hear them does nothing to alter this conclusion. n19

> n19 The Court notes that the Attorney General's remarks created an additional potential for mischief. The trial had been going on for some time, and would continue for several more weeks. If any juror had been looking for an excuse to be dismissed, the Attorney General's statement would have provided this opportunity. Fortunately, the jurors served admirably in this regard, as they did throughout the lengthy and difficult trial.

[**72]

[*748] Finally, the Court cannot help but observe that, even in the absence of the October 23, 2001 Order regulating public statements about the case, any experienced trial lawyer should know that it is inappropriate to comment publicly about the credibility of a witness during a trial. For the reasons already discussed, such a public statement is fraught with risk to the fairness and integrity to the proceedings. Accordingly, on all of these grounds, the Court finds that its Order was violated through the Attorney General's public statement about this case on April 17, 2003.

3. The Record Does Not Support a Finding of Willfulness.

Having found that the Attorney General's two public statements about this case violated the October 23, 2001 Order, the Court next must consider whether either of these violations was willful. As noted earlier, this element is satisfied only through a "deliberate or intended violation" of the Court's Order, "as distinguished from an accidental, inadvertent or negligent violation." *Smothers, 322 F.3d at 442* (internal quotations and citations omitted). In his November 26, 2003 letter to the Court, the Attorney General states that his remarks [**73] were "entirely inadvertent," and that he "made a mistake" for which he "apologized to the Court and counsel." The Attorney General further states that he "had no intent either to disregard the Court's Order or to disrupt the ongoing trial proceedings." The Court accepts the Attorney General's characterization of his remarks as inadvertent, and this in itself negates the criminal intent necessary to sustain a contempt charge. See *Smothers, 322 F.3d at 442*; *Chandler, 906 F.2d 248, 250*. Moreover, the statements themselves and their surrounding circumstances persuade the Court that the Attorney General did not willfully violate the Order.

With respect to the first violation, the Attorney General's October 31, 2001 statement bears all of the hallmarks of inadvertence rather than willfulness. The Attorney General referred to Defendants in a single, isolated remark made during a lengthy press conference addressing the Justice Department's various efforts in the war on terror. This is a far cry from the repeated and flagrant abuses that the courts have deemed sufficient to establish willfulness beyond a reasonable doubt, as necessary to sustain a conviction [**74] for criminal contempt. See, e.g., *Cutler, 58 F.3d at 837* (upholding the criminal contempt conviction of an attorney who "persistently attempted to try [his] case in the media, despite [the judge's] repeated warnings," and who directly addressed "prospective veniremen" in some of his public remarks); *In re Levine, 307 U.S. App. D.C. 144, 27 F.3d 594, 596-97 (D.C. Cir. 1994)* (affirming a criminal contempt citation where an attorney repeatedly sought to elicit testimony regarding a document that the court had ruled inadmissible on several occasions, and where he exhibited "wholesale disobedience" to the court's orders), cert. denied, *514 U.S. 1015, 131 L. Ed. 2d 214, 115 S. Ct. 1356 (1995)*.

Nor is this an instance where the context of a statement is suggestive of an improper motive. Viewed as a whole, the Attorney General's press briefing, coming shortly after September 11, served the important and wholly legitimate purpose of keeping the American public informed about the latest developments in the war on terror. A limited reference to this case would have been entirely appropriate to, and fully consistent with, this objective. Indeed, if [**75] the Attorney General had confined [*749] his remarks to the allegations of the indictment, there would have been no violation whatsoever of the October 23, 2001 Order, much less a willful one. See ABA Model Rules of Professional Conduct, Rule 3.6(b) (providing that lawyers may state "the claim . . . involved" in a proceeding and "information contained in a public record"). Again, this case is distinguishable in this respect from Cutler, for example, where the attorney purposefully selected speaking fora that would enable him to reach prospective jurors. See *Cutler, 58 F.3d at 828-31, 837*.

The timing of the Attorney General's statement also militates against a finding of willfulness, albeit not for the reasons suggested by the Government. This statement was made on October 31, 2001, just eight days after the Court entered its Order governing public communications about the case. Although the Government and Defendants alike stipulated to the entry of this Order, and while it might well be presumed that Justice Department officials in Washington, D.C.

provided some input in counsel's drafting of the proposed language of the Order, it cannot be said with any degree of [**76] certainty that the Attorney General himself or members of his immediate staff were immediately aware, within a few short days, of the entry and terms of the October 23, 2001 Order. Any such lack of awareness and focus would have been particularly understandable under the circumstances, where the Nation was still reeling from the shock of September 11, and where the Department of Justice had just begun to assume its role in the administration's comprehensive and far-reaching war on terror.

Absent direct notice of a court's order, there can be no willful violation under *§ 401(3)*. See *Cutler, 58 F.3d at 834*. It was for precisely this reason, among others, that the Court elected to address the Attorney General's October 31, 2001 statement somewhat informally, through an off-the-record *in camera* conference with trial counsel and a representative of the Attorney General's Office in Washington, D.C. The Court was unwilling to assume at that point that its Order had been disseminated throughout all levels of the Justice Department, and that the Attorney General had made his statement despite his knowledge of this Order. Rather, the Court assumed just the opposite and, [**77] by means of this conference, took steps to ensure that all relevant DOJ officials were promptly informed of their obligations under the October 23, 2001 Order. To be sure, Government officials, including the Attorney General, are not automatically granted "one free bite" as to any court order, simply by virtue of their position and the logistical demands of broadly disseminating the order. Nonetheless, the Court believes that this is an appropriate consideration in assessing the willfulness of the Attorney General's violation.

This is all the more true under the exceptional circumstances that existed at the time of the Attorney General's initial public statement about this case. The Court fully appreciates, in particular, that the Attorney General faced a number of very serious challenges and demands in the immediate wake of September 11, a singularly traumatic time in our Nation's history. During this period, it seems safe to assume that the Attorney General's attention was focused on other, more immediately pressing matters of national concern. As the Court discusses at greater length below, these demands upon the Attorney General make it imperative that he employ, and rely upon, [**78] professional staff who are specifically attuned to the developments and details of ongoing cases and criminal investigations, and who can prevent the sort of mistake that was made here. These flaws in procedure or staff [*750] oversight, however, do not reflect a willful violation.

Further, while the Justice Department's prompt retraction of the October 31, 2001 statement has only a modest impact on the "likelihood of prejudice" inquiry, it is considerably more relevant to the issue of willfulness. Such a retraction, in particular, is flatly inconsistent with any deliberate purpose to violate the Court's Order by poisoning the well of public opinion. To the contrary, it indicates that the Attorney General's Office recognized its error and acted quickly to correct it. For all of these reasons, then, the Court finds that the evidentiary record points decisively toward the conclusion that the Attorney General's first public comment about this case was an inadvertent rather than willful violation of the Court's Order.

This leaves the question whether the Attorney General's second statement about this case constituted a willful violation. Though it is a closer question than with the first statement, [**79] the Court again finds insufficient evidence that this more recent violation was willful. Once again, the direct evidence in the record uniformly attests to inadvertence rather than wilfulness. As noted, a Justice Department spokesperson stated the day after the Attorney General's April 17, 2003 remarks that "we certainly had no intent to contravene the judge's wishes regarding publicity." Next, and more specifically, the Attorney General's November 26, 2003 letter to the Court states that "my remarks were entirely inadvertent," and that "I had no intent either to disregard the Court's Order or to disrupt the ongoing trial proceedings, much less cause prejudice to the defendants."

In contrast to the first violation, however, it cannot be said that the surrounding circumstances uniformly support this claim of inadvertence. Most significantly, while the Attorney General and his staff perhaps were personally unaware of the October 23, 2001 Order at the time of the press briefing held just eight days later, the same cannot be said as of the time of the Attorney General's most recent remarks. In the interim, senior Justice Department officials had been summoned on *two separate occasions* [**80] to *in camera* conferences with the Court, and were expressly advised in both instances about the terms of the October 23, 2001 Order and the Court's view that the Attorney General and his staff were bound by these terms. The second of these conferences was on the record, and Deputy Attorney General Lawrence D. Thompson assured the Court that he would "bring your concerns to the attention of the appropriate people" in the Justice Department, and that "we'll make certain that we do everything we possibly can to bring to the attention [of] our employees the absolute[] necessity to not only obey all court orders, [but] make certain all defendants receive fair and just trials." (10/7/2002 Conference Tr. at 17.) Then, immediately after this conference, the Deputy Attorney

General circulated an October 16, 2002 memo to the Attorney General's Office, among other Justice Department divisions, setting forth the terms of the October 23, 2001 Order and instructing all Department employees to "avoid making any statement about this case except in strict compliance with the Court's order, applicable rules, and Department policy." (10/16/2002 Thompson Memo at 2.) Consequently, the Court [**81] has little doubt that the Attorney General and his staff were fully aware of the October 23, 2001 Order at the time of the April 17, 2003 press conference -- and, to their credit, neither the Government nor the Attorney General contends otherwise in their recent submissions.

[*751] Nor, with the passage of over 18 months' time, can the Government as readily appeal to the extraordinary and immensely challenging circumstances in the immediate aftermath of September 11 as justifying a lack of careful attention to the terms of the Court's Order. Rather, given ample, repeated notice and sufficient opportunity to disseminate this information to all appropriate Justice Department employees, it should not have been too much to expect strict compliance with the Order by the time this case approached trial, and certainly during the trial itself. Indeed, even absent a specific order, this or any Court has the right to expect that a lawyer, and particularly an attorney for the Government, will exercise the utmost restraint in making comments about evidence or witnesses in the midst of a trial -- and, even more so, comments about the credibility of a witness or the value of his testimony to a party. [**82] As noted at the outset, it is a basic tenet of our system of justice that trials are conducted in the courtroom, and not the media. If a violation under these circumstances does not necessarily bespeak willfulness, it at least is indicative of a disquieting lack of professional vigilance and care.

Nonetheless, other considerations militate against a finding of willfulness. First, while it bears emphasis that even a brief or passing remark can undermine a fair trial, the Court acknowledges the Government's point that the Attorney General's limited reference to this case at his April 17, 2003 press conference cannot readily be viewed as an egregious or blatant attempt to prejudice the jury -- the Attorney General did not, for example, explicitly characterize Youssef Hmimssa as "honest" or "candid," but instead stated somewhat more obliquely that his testimony was of "substantial value." Similarly, while the Government's alternative, more innocent interpretation of this remark does not take it outside the proscriptions of the October 23, 2001 Order, the Court recognizes that it is possible to construe this statement, within the larger context of the press conference as a whole, as merely [**83] intending to cite Youssef Hmimssa as one of several examples of individuals who have assisted the Government's war on terror by cooperating and providing information about potential terrorism-related activities. If this were the message the Attorney General meant to convey, it would lie more at the periphery than the core of the concerns that animated the October 23, 2001 Order. At a minimum, this element of ambiguity undercuts a finding of willfulness -- a statement deliberately intended to violate the October 23, 2001 Order might well be expected to be considerably more direct in its meaning.

Next, as was the case with the Attorney General's first statement about this case, his second statement was not delivered in a forum and fashion that would have inevitably or unavoidably posed a danger of prejudice to these proceedings. While, as noted, it certainly was not prudent to offer any comment at all on the testimony in an ongoing trial, the April 17, 2003 press conference, like the earlier press briefing, was part of a series of the Attorney General's legitimate ongoing efforts to keep the country informed about the latest developments in the war on terror. In this setting, somewhat [**84] removed both geographically and by subject matter from the proceedings before this Court, an isolated comment about this case would not necessarily be expected to directly and dramatically undermine Defendants' right to a fair trial. And, as the Government points out, no actual prejudice resulted from the Attorney General's remarks, because the jurors scrupulously adhered to this Court's instruction that they should avoid reading or viewing any reports [*752] about the case. While these considerations are not conclusive proof of inadvertence versus willfulness, the Court cannot help but believe that a deliberate violation of the October 23, 2001 Order would be better designed and targeted to achieve some impermissible objective, and that the improper intentions of the violator would be reasonably evident in the record. Simply stated, no such indicia of criminal intent are present here.

More generally, when the Attorney General's two violations are viewed collectively and in light of their surrounding circumstances, the consistent picture that emerges is one of carelessness, as opposed to a willful intent to violate the Court's Order and prejudice these proceedings. There was no ongoing series [**85] of incidents, but instead two isolated episodes separated by eighteen months. The statements regarding this case were not blatantly inflammatory or designed to attract attention, but instead were quite brief, somewhat vague and, in one instance, quickly retracted. The Attorney General's remarks were not directly aimed at these proceedings, but instead were delivered as part of much broader messages to a much wider audience concerning the Nation's war on terror. These circumstances, in short, are nothing like those presented in the typical cases

where attorneys have been found guilty of criminal contempt for making prejudicial public comments about an ongoing proceeding.

Still more generally, the Court fully appreciates and recognizes the dual and sometimes competing responsibilities of the Attorney General as a senior executive branch officer and the Nation's chief prosecutor. Although the Attorney General's specific comments regarding this case were inappropriate in his role as prosecutor, the remainder of his remarks at the October 31, 2001 and April 17, 2003 press briefings surely represented a legitimate and appropriate exercise of his duty as a Cabinet official to inform the [**86] public about matters of executive policy and governance. To the extent that the Attorney General and his staff failed to properly reconcile the obligations imposed under these two roles, this lack of careful review, oversight, and attention to detail is not indicative of criminal intent to violate a court order, and the proper remedy is not a fine or imprisonment of the Justice Department's most senior official. To be sure, the violations here strongly indicate that the process employed by the Attorney General and his staff in preparing the comments at issue is in need of close examination and reform. Yet, a criminal contempt charge is a wholly unsuited instrument for exploring any such defects in Justice Department procedures.

To be sure, these apparent procedural flaws produced two lamentable incidents in this case, disrupted the orderly conduct of the proceedings, and created a significant risk of prejudice to Defendants' fair trial rights. The Court fully shares defense counsel's frustration at the unnecessary diversion of resources and attention to address the Attorney General's two violations of the October 23, 2001 Order. Beyond this, the Court has a responsibility to ensure [**87] that judicial orders are obeyed by all, no matter the importance of the office they hold. Yet, the present record simply fails to indicate, let alone establish beyond a reasonable doubt, that the Attorney General willfully violated this Court's Orders. Hence, this record provides no basis for pursuing criminal contempt charges under *§ 401(3)*.

C. Further Proceedings To Explore Issues of the Attorney General's Intent Are Not Warranted Under the Circumstances.

The preceding analysis rests exclusively upon the present record, and the [*753] Court freely acknowledges that this record is limited in certain important respects. Defendants correctly point out, for example, that the Government's initial response to their motion was prepared and signed by the U.S. Attorney for this District, and included assertions about the Attorney General's intent that were not supported by any affidavit, testimony, or statement of any kind. Although the Attorney General's subsequent letter to the Court fills this gap in the record, opposing counsel in an ordinary case would be permitted to test such a statement through depositions, other forms of discovery, or cross-examination at an evidentiary hearing. [**88] Nonetheless, for the reasons explained below, the Court finds that further discovery or hearings on matters relating to the Attorney General's intent would be neither beneficial nor prudent.

First and foremost, it bears emphasis that the Attorney General wrote his November 26, 2003 letter to the Court "not only as the Attorney General to the United States, but also as an officer of the court." (Attorney General's 11/26/2003 Letter at 1.) This is significant to the Court. As an officer of the court, the Attorney General owes a professional duty of candor toward this tribunal, and is ethically bound to be accurate and complete in his representations to the Court. See ABA Model Rules of Professional Conduct, Rule 3.3. "Attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." *Holloway v. Arkansas, 435 U.S. 475, 486, 98 S. Ct. 1173, 1179, 55 L. Ed. 2d 426 (1978)* (internal quotations and citation omitted); see also *United States v. Talley, 194 F.3d 758, 763 (6th Cir. 1999)* (stating that an Assistant U.S. Attorney who had been admonished by the District [**89] Court "appeared remorseful and apologetic" at oral argument before the appellate court, and that, "recognizing that he is an officer of the court, we take him at his word"), cert. denied, *528 U.S. 1180, 145 L. Ed. 2d 1118, 120 S. Ct. 1217 (2000)*; *Smith v. Anderson, 689 F.2d 59, 64 (6th Cir. 1982)* (observing that statements made by an attorney in his capacity as an officer of the court "are made as if upon oath").

Accordingly, the Attorney General's statements in his letter, on matters of intent that are uniquely within his own personal knowledge, are entitled to considerable deference. While not under oath, these statements are imbued with comparable indicia of truthfulness, as they carry the potential for disciplinary measures if they are discovered to be untrue. Moreover, as Justice Frankfurter once observed regarding representations made by a U.S. Attorney:

> It surely is not the duty of a district judge to investigate a response by one who is an officer of the court as well as of the United States on the assumption that he has intentionally or irresponsibly violated his responsibility to the court and the Government in conducting the Government's case in a manner [**90]

> consistent with basic legal ethics and professional care.

Campbell v. United States, 365 U.S. 85, 103, 81 S. Ct. 421, 431, 5 L. Ed. 2d 428 (1961) (Frankfurter, J., dissenting in part). Surely, this is no less true of a statement by the Attorney General as an officer of the court.

Next, because the Attorney General's letter "personally . . . addresses" the Court's concerns about possible violations of its October 23, 2001 Order, and because a criminal contempt charge likewise turns upon issues of individual intent, there seemingly would be no way to test or explore the statements in the letter without requiring the Attorney General himself [*754] to testify. Such a procedure, however, raises substantial constitutional concerns. As observed by the Second Circuit in a case also involving the question whether contempt sanctions should be imposed on the Attorney General:

> This case is unusually important for another reason because the order for which review is sought adjudged the Attorney General of the United States in civil contempt. Although we unequivocally affirm the principle that no person is above the law, . . . we cannot ignore the fact that a contempt sanction [**91] imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant.

Socialist Workers Party v. Attorney General (In re Attorney General of the United States), 596 F.2d 58, 64 (2d Cir.), cert. denied, *444 U.S. 903, 62 L. Ed. 2d 141, 100 S. Ct. 217 (1979)*.

More specifically, the Government points to a number of cases in which the courts have declined to order the appearance or testimony of Cabinet officers or other senior Government officials, absent exceptional circumstances and a compelling need for information that is not otherwise obtainable. See, e.g., *In re United States, 197 F.3d 310, 314 (8th Cir. 1999)* (quashing subpoenas directing Attorney General Janet Reno and Deputy Attorney General Eric Holder to testify regarding the procedures used in deciding whether to pursue the death penalty); *In re United States, 985 F.2d 510 (11th Cir.)* (quashing subpoena directing the FDA Commissioner to testify), cert. denied, *510 U.S. 989, 126 L. Ed. 2d 447, 114 S. Ct. 545 (1993)*; *In re Office of Inspector General, Railroad Retirement Board, 933 F.2d 276, 278 (5th Cir. 1991)* [**92] (cautioning the District Court on remand to "remain mindful of the requirement that exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted); see also *Jones v. Clinton, 36 F. Supp. 2d 1118, 1132-34 (E.D. Ark. 1999)* (electing to address only the misconduct of former President Clinton that was indisputably established in the record, and citing various grounds for avoiding further hearings to explore other possibly contumacious conduct). "Allegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." *In re United States, 197 F.3d at 314*.

The conduct at issue here unquestionably is that of the Attorney General himself and his direct staff, as opposed to a more general matter of departmental policy or agency decisionmaking. Nonetheless, there is no compelling need here for the Attorney General's in-court testimony. As noted earlier, all of the direct evidence of record concerning the Attorney General's state [**93] of mind uniformly indicates that his comments about this case were not willfully intended to violate the October 23, 2001 Order, but rather were the product of inadvertence and a lack of careful, rigorous oversight. In particular, the Attorney General has stated, as an officer of the court, that he "had no intent either to disregard the Court's Order or to disrupt the ongoing trial proceedings." In addition, the Court already has found that the circumstantial evidence tends to support this assertion. This seemingly forecloses any determination, especially beyond a reasonable doubt, that the Attorney General acted with criminal intent. The Attorney General's further testimony on this issue would be necessary only if one were prepared to believe that he might recant [*755] the statements in his November 26, 2003 letter, and instead acknowledge a willful violation of the Court's Order. Needless to say, there is no conceivable basis for believing that the Attorney General's sworn testimony would deviate in any respect from his statements in his recent letter.

Moreover, as a practical matter, any meaningful inquiry into the statements at issue here would not begin and end with the Attorney General [**94] himself, but surely would extend to members of his immediate staff. After all, the Attorney General surely is not the sole and exclusive, or likely even the principal, author of the statements he makes at press briefings. Rather, such statements undoubtedly are the product of a number of staffers, each of whom would have to be examined to

determine: (i) whether he or she authored one of the statements about this case; (ii) whether the drafters of these statements were made aware of the Court's October 23, 2001 Order; and (iii) if so, whether they nonetheless inserted the statements into the Attorney General's press briefings with the deliberate intent of violating this Order. No matter how such an investigation might unfold, it is exceedingly unlikely to reveal that the Attorney General himself commented about this case with the willful intent to violate the October 23, 2001 Order.

All of this brings the Court back to the point made earlier. Any further inquiry into the circumstances surrounding the Attorney General's statement is far more likely to reveal flaws in the process employed by his staff in drafting and reviewing his public communications. As is evident from the incidents [**95] in this case, and as the Attorney General himself acknowledges in his letter to the Court, he and his staff "need to be more careful when including references to ongoing cases" in his remarks to the media. No wild speculation is necessary to postulate that the statements made by the Attorney General in his public policy role are not being sufficiently vetted by seasoned staff with prosecutorial experience to ensure that no improper or potentially prejudicial remarks are made about pending cases. It is inconceivable to the Court that lawyers with experience in conducting criminal investigations and trials would have permitted the comments about this case to be included in the Attorney General's prepared remarks -- particularly after twice being specifically put on notice by the Court that such statements were prohibited. If this lack of careful review was the cause of the violations of the Court's Order, and if the objective is to take meaningful and measured steps to sanction these violations and ensure that they are avoided in the future, the Court firmly believes that a criminal contempt proceeding is not an effective and appropriate mechanism for achieving these objectives.

Indeed, [**96] to the extent that the Attorney General's transgressions here were attributable to an improper balancing of his public policy and prosecutorial roles, there is ample reason for the Court to proceed with caution, and to ensure that any punitive or disciplinary measures do not unduly encroach upon the Attorney General's legitimate political functions. The Sixth Circuit stressed a similar point in *Ford, supra*, in which the District Court had imposed a broad "do-not-discuss" gag order upon the defendant member of Congress:

> . . . The doctrine of separation of powers -- a unique feature of our constitutional system designed to insure that political power is divided and shared -- would be undermined if the judicial branch should attempt to control political communication between a congressman and his constituents. It would tend [*756] to undermine the representative nature of the democratic process and the legislator's responsibility to the electorate to account for his actions . . . . A representative's legislative role is not limited to formal speech and debate in Congress but includes communication with the electorate.

Ford, 830 F.2d at 601 (citation omitted). [**97] Much the same can be said about the Attorney General as a political appointee of the President.

Apart from all of these prudential concerns, the Court must consider certain procedural constraints as well. In particular, it would be no simple matter to secure the Attorney General's testimony regarding his statements at the October 31, 2001 and April 17, 2003 press conferences. The Court could not, for example, merely order the Attorney General to appear at an evidentiary hearing and testify about his actions. Rather, so long as criminal contempt charges remain in play, any proceedings must comport with the dictates of *Fed. R. Crim. P. 42(a)* and the Constitution -- formal notice must be given, a prosecutor must be appointed, n20 and the Attorney General must be accorded the full panoply of constitutional protections, including the privilege against self-incrimination. The record in support of criminal contempt charges here falls well short of warranting the engagement of this complex machinery.

> n20 Notably, U.S. Attorney's Office could not undertake this task, as any Department of Justice official would be operating under a conflict of interest. Needless to say, it would be no simple undertaking for the Court to identify and appoint a suitable prosecutor in this matter.

[**98]

Finally, even assuming all of these considerable obstacles could be (and should be) overcome, and even in the unlikely event that further investigation uncovered some evidence of a willful violation, the Court then would face the unsettling prospect of recommending that criminal contempt charges be brought against a sitting Cabinet officer. Again, it is instructive to consider the observations of the Second Circuit as it reviewed an order holding then-Attorney General Griffin Bell in civil contempt of court for failing to obey an order to disclose information about confidential government informants:

> We begin our analysis of the merits by stressing two considerations. The first is the nature of the contempt power itself. Just as, we trust, an Attorney General would not lightly invoke a privilege such as the one that he invokes here, so too the court must not lightly invoke its contempt power. For the exercise of that power is, even in the context of a private attorney, awesome in its implications. Second, in an extraordinary case such as this, the significance of abuse of discretion is magnified . . . . Here, as noted above, the contemnor is not simply an attorney but the chief [**99] law enforcement officer of the nation, a public official who exercises powers entrusted to him by both the executive and legislative branches, with obligations to the judicial branch, and who is the principal attorney for another branch of government coequal to the judicial branch in constitutional function and design. Courts accordingly owe him respect as an official and, absent an abuse of power or misuse of office, the most careful and reasoned treatment as party or as litigant.

Socialist Workers Party, 596 F.2d at 65 (internal quotations, citations, and footnote omitted).

To invoke the Court's contempt power here would implicate both of these concerns. This Court is unwilling to incur [*757] such substantial costs without any realistic prospect of a commensurate gain, whether as to vindication of the Court's authority, discipline against those who violate its orders, or prevention of similar violations in the future. Rather, as set forth below, the Court finds that its inherent disciplinary powers are sufficient to achieve its desired objectives in this case.

D. The Court Finds that a Formal Judicial Admonishment Is the Appropriate Sanction for the Attorney [100] General's Violations of Its Order.**

The Court's determination that its criminal contempt powers should not be exercised here does not bring the matter to an end. The Court's October 23, 2001 Order was violated on two occasions, and these incidents threatened the fairness of these proceedings. It has long been recognized that federal courts have the inherent power to discipline attorneys who violate their orders, separate and apart from their authority under the contempt statutes. See, e.g., *Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991)*; *Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512, 22 L. Ed. 205 (1874)*; *Smothers, 322 F.3d at 442*; *Jones, 36 F. Supp. 2d at 1124-26.* The Supreme Court has explained:

> The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, [**101] and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450, 31 S. Ct. 492, 501, 55 L. Ed. 797 (1911).*

Young v. United States, 481 U.S. 787, 796, 95 L. Ed. 2d 740, 107 S. Ct. 2124, 2131-32 (1987). Although the range of options is perhaps more limited here than in a civil case, where such measures as fee-shifting and issue preclusion may be employed, the Court nonetheless possesses "the flexibility to equitably tailor punishments that appropriately fit the conduct" at issue here. *Smothers, 322 F.3d at 442.*

Before considering various possible measures, the Court first believes it important to explain why, in its judgment, some form of sanction is necessary here. Most significantly, of course, the Attorney General violated the Court's October 23, 2001 Order on more than one occasion. As observed earlier, the first of these transgressions was perhaps understandable, particularly under the extraordinary circumstances that existed in the immediate aftermath of September 11, and in light of the [**102] difficult and challenging matters of the utmost national concern that the Attorney General confronted at the time. In addition, the Court must consider that, while Justice Department officials had been promptly furnished with a copy of the October 23, 2001 Order, the Attorney General himself and his immediate staff might well have lacked actual notice of this Order at the time of his first public comment about the case.

Matters were far different, however, by the time of the Attorney General's most recent public statement about this case. First, in the intervening period, a draft indictment apparently was leaked to the media before it had been returned by the grand jury, itself a very serious matter. In addition, during this same period, the Court had directly spoken with very senior Justice Department

officials on two separate occasions, both times eliciting promises [*758] that the Attorney General and his staff would be advised of the terms and demands of the October 23, 2001 Order and that there would be no further incidents. As a further result of these conferences, Deputy Attorney General Lawrence D. Thompson prepared a memo addressed directly to the Office of the Attorney General, [**103] among other Justice Department entities, which expressly recounted the terms of the October 23, 2001 Order and cautioned against "making any statements about this case except in strict compliance with the Court's order." Despite all this, the Attorney General commented publicly about this case a second time -- and did so at a most sensitive moment in these proceedings, in the middle of trial.

Nor can the Court overlook the very real threat of prejudice that arose as the result of the Attorney General's remarks. In the first, Defendants were erroneously linked to the September 11 attacks -- an allegation arguably as damaging as any that could be made against a subject of a criminal indictment, particularly in the weeks immediately following the tragic events of that day. In the second, the Nation's highest law enforcement official stated, in the middle of a trial, that the testimony of a key Government witness had been of "substantial value" to the Government. It bears repeating that even absent a court order, such a remark would have been inappropriate, if not improper.

The Court recognizes that no actual prejudice in fact resulted from these public comments. The jury was subject [**104] to extensive and searching *voir dire* before trial, and to further *voir dire* in light of the Attorney General's statement during the trial, and this process failed to reveal any prejudice to Defendants. While defense counsel opine in their December 9, 2003 letter to the Court that "no one really knows whether the jurors were completely candid about their exposure to the public comments by the Attorney General," the Court is confident that the jury *voir dire* in this case went to the greatest extent possible to uncover any such improper external influences, and that the jury solemnly discharged its duties and truthfully answered the inquiries of the Court and counsel alike. n21

> n21 Notably, as observed earlier, defense counsel declined the opportunity to question the individual jurors any further about the Attorney General's statement during the trial.

Nonetheless, the *potential* for prejudice was undeniable under the circumstances. Particularly as to the Attorney General's second remark, the [**105] Government must count itself fortunate that the jurors heeded this Court's instruction and avoided any media reports about the case. If matters had unfolded differently, this Court would have been faced with the most difficult of decisions, coming after months of rigorous and demanding pretrial preparations and in the midst of a lengthy trial. It was precisely to *avoid* such a dilemma, and to instead ensure a trial environment free of outside influences and prejudices, that the Court and the parties agreed that public communications about the case should be strictly and closely regulated. Under the circumstances, the Court simply cannot look the other way at two separate violations -- the second after repeated warnings -- of a stipulated Order which was entered for the very purpose of safeguarding Defendants' inviolate right to a fair trial.

The Court also recognizes, and sincerely appreciates, that the Attorney General has conveyed his personal apology to the Court and counsel, has expressed his regret for making the statements at issue here, and has acknowledged that he "made a mistake" in making these statement. On this matter, the Court does not share defense [*759] counsels' [**106] reservations that the Attorney General's apology is "insufficient" or that his letter might not be "sufficiently contrite." Rather, this Court places great weight and significance upon such personal expressions of regret by a sitting Cabinet official. Indeed, it is with a great deal of hesitation that the Court considers the imposition of sanctions, in the face of the Attorney General's personal and direct assertion that "I take these matters very seriously and will make every effort to ensure that the difficulties occasioned in this instance will be avoided in the future." On this subject, as with the others addressed in his letter, the Court takes the Attorney General at his word.

Nonetheless, the two serious transgressions committed in this case are simply one too many for the Court to abide with no response. The steps that the Attorney General now promises to take should have been taken after the first violation of the Court's Order or, at a minimum, after a senior Justice Department official had attended the second of the conferences convened by the Court to underline the obligations imposed under its Order and emphasize that the Order would be strictly enforced. Although a memo [**107] was circulated among the Office of the Attorney General, this apparently did not occasion any sort of review, or an effective review at any rate, of the procedures used to vet proposed public statements about pending cases.

Even beyond the specific Order entered in this case, and the particular incidents that arose concerning this Order, the Attorney General and his staff seemingly should have been more aware of the concerns triggered by references to pending criminal investigations or proceedings. This is not a new issue, after all, nor is it

unique to Attorney General Ashcroft – rather, it has been confronted by other Attorneys General in the past. Consider, for example, an opinion issued by the American Bar Association back in January of 1940, addressing possible concerns with the Attorney General's announcement in May of 1938 that "the Department of Justice would from time to time issue public statements throwing light on the prosecution policy with respect to anti-trust laws." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 199 (1940). This opinion states in part:

> The Attorney General is the executive head of the Department of Justice of the United States. He and his [**108] subordinates are the legal representatives of the United States in all proceedings, both civil and criminal, in the courts of the United States in which the United States is a party or has an interest. In a broad aspect the Attorney General is attorney for the body politic. Therefore, in publishing his reports and in issuing public statements for dissemination through ordinary news channels, he is reporting to the public. Herein lies a material difference between a report or press release issued by the Attorney General and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in criminal and civil prosecutions, be neither impaired nor prejudiced.
>
> The experienced trial lawyer knows that an adverse public opinion is a tremendous disadvantage to the defense of his client . . . . Trials are open to the public, and aroused public opinion respecting the merits of a legal controversy creates a court room atmosphere which, without any vocal expression in the presence of the petit [**109] jury, makes [*760] itself felt and has its effect upon the action of the petit jury. Our fundamental concepts of justice and our American sense of fair play require that the petit jury shall be composed of persons with fair and impartial minds and without preconceived views as to the merits of the controversy, and that it shall determine the issues presented to it solely upon the evidence adduced at the trial and according to the law given in the instructions of the trial judge.
>
> * * * *
>
> An examination of the public statements and a discussion thereof with the Assistant Attorney General in charge of the Anti-Trust Division leads us to conclude that a conscientious effort has been made to regard the limitations, to which we have adverted, in the formulation of these press releases.
>
> However, in certain instances the public statements purport to state as facts actions of persons, associations, or corporations upon which the Department of Justice intends to predicate criminal or civil actions for violations of the federal anti-trust laws. Since these statements emanate from the high office of Attorney General, it is probable that the public will accept them without qualification or reservation. [**110] They might tend to inflame the public mind and create a public attitude adverse to the defendants to such proposed proceedings prior to grand jury investigation and trial of the criminal charges and the judicial determination of the civil complaint . . . .
>
> * * * *
>
> While we see no objection to statements reflecting departmental policy, nor to statements of fact relating to past proceedings in the nature of reports, when, as here, the statements relate to prospective or pending criminal or civil proceedings, they should omit any assertions of fact likely to create an adverse attitude in the public mind respecting the alleged actions of the defendants to such proceedings.

Id. (citations omitted). In addition, the ABA has revisited this and related subjects in subsequent opinions. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 199 (1975).

This Court fully recognizes, as did the ABA in the above-quoted opinion, that the Attorney General occupies two roles of equal importance, one as the

Nation's chief prosecutor, and one as the head of an Executive department with responsibilities to keep the public informed on policy matters. While these dual [**111] roles might occasionally lead in different directions, and while the Attorney General undoubtedly faces a difficult and challenging task in harmonizing these two roles, this nonetheless is, and has always been, an inescapable reality of the position of Attorney General.

It is not the place of this Court, and it is surely a matter beyond its competence and expertise, to tell the Attorney General how to organize and staff his Office in order to strike the appropriate balance between these sometimes-competing obligations. Yet, it is unquestionably the duty of this Court to ensure that the defendants who appear before it are accorded their fair trial rights under the Constitution, to enter orders designed to protect these rights, and to see that its orders are obeyed.

All trial counsel in this case scrupulously adhered to the October 23, 2001 Order at all times, save one defense attorney who was substituted out of the case well before trial. The incentive for defense counsel, in particular, to push the boundaries of the Court's Order surely was great, in light of the public passions and interest aroused in the aftermath of September 11 on all matters [*761] relating to terrorism. This incentive [**112] was only increased, of course, through the various public communications about this case that tended to favor the Government's position. Yet, throughout all this, defense counsel continued to proceed under the rules established by this Court. In the interests of fairness and equity, the Court must insist that everyone governed by the October 23, 2001 Order be judged by the same standards. Under the circumstances, the Court is firmly convinced that the statements at issue here would warrant sanctions against any attorney who made them, regardless of his position. That the Attorney General made them, therefore, cannot deter the Court from its usual course.

Accordingly, the Court considers which of the various available sanctions would be most appropriate here. In *Smothers, supra*, the Sixth Circuit suggested a non-exclusive list of sanctions short of contempt that a court might employ. First, as a general matter, the Court indicated that "progressive discipline" is the preferred approach, so as to identify the least severe and punitive, yet still effective means to respond to a transgression. *Smothers, 322 F.3d at 442*. Thus, an initial incident might [**113] warrant "a lecture from the court," or some similar form of warning. *322 F.3d at 442*. Here, of course, the Court employed such measures on two separate occasions, following the Attorney General's first public comments about the case, and then again in connection with the leak of the Second Superseding Indictment. Yet, these warnings and resulting assurances failed to prevent a further violation. Plainly, then, more than a warning is necessary here.

The Sixth Circuit next suggested that a court might require "an apology on the record." *322 F.3d at 442*. The Attorney General has apologized personally to the Court and counsel in his November 26, 2003 letter, which is now a part of the public record in this case. As discussed earlier, this apology goes a long way toward addressing the Attorney General's violations of the Court's Order. The Court presumes that such apologies are rare, and that the Attorney General would not lightly or favorably regard the prospect of having to issue any similar sort of statement in a subsequent case. Because of this, the Court further presumes that the Attorney General will follow through on his assurance in his letter that he [**114] will "make every effort to ensure that the difficulties occasioned in this instance will be avoided in the future."

Nonetheless, the Court cannot help but observe that an apology was offered earlier in this case on behalf of the Attorney General, and that this did not prevent a subsequent violation of the October 23, 2001 Order. Specifically, at the November 2, 2001 *in camera* conference convened shortly after the Attorney General's initial public reference to this case, then-Assistant Attorney General Michael Chertoff, the head of the Justice Department's Criminal Division, expressed his regret for any disruption in the proceedings as a result of the Attorney General's remarks, and assured the Court that no further such incidents would occur during these proceedings. Consequently, the Court believes it necessary to advance to the next step in the regimen of progressive discipline.

The next category of sanction identified in Smothers is some form of attorney discipline, either imposed by the court itself or addressed through a reference to the appropriate bar association. See *Smothers, 322 F.3d at 443*. As to the latter option, the Court deems it both inappropriate [**115] and unnecessary to refer this matter to a bar association, for a number of reasons. As [*762] is evident from this Opinion, this Court is amply familiar with the facts and circumstances surrounding the two violations of its Order, and it would be difficult, as well as wasteful of resources, for any disciplinary board to recreate this record. More importantly, because the conduct at here implicates its own Order, this Court is in a superior position to enforce its decrees and vindicate its own authority. It is solely the province of this Court, for example, to construe the "reasonable likelihood of prejudice" language of the October 23, 2001 Order, and to determine whether a public statement transgresses this prohibition.

Further, this matter does not concern the conduct of an attorney engaged in the traditional practice of law before this Court. n22 Rather, as observed earlier, it appears most likely that the violations here were a product of flawed procedures in the Attorney General's Office for reviewing public statements about pending cases. A bar disciplinary proceeding is an inappropriate forum for addressing a matter of this sort. Indeed, as noted earlier, it is likely that a full [**116] inquiry into the circumstances surrounding the Attorney General's statements would involve staff members in the Attorney General's Office, and not just the Attorney General himself. Having itself determined that such an investigation would be inappropriate and unnecessary, the Court cannot then invite a bar disciplinary board to undertake a similar inquiry.

n22 Because it does not, it is not even clear which State's bar association would be best suited to address the Attorney General's conduct in this case.

Finally, and perhaps most importantly, the Court believes that its own disposition of this matter obviates the need for further review of the Attorney General's conduct in this case. For the reasons previously discussed, the Court has found no evidence of a willful violation of its Order. This being so, the Court finds no basis for referral or further disciplinary action, beyond whatever sanction the Court elects to impose here.

Without diminishing in the least the seriousness with which it views the Attorney [**117] General's conduct in this case, the Court considers any bar proceedings as both unnecessary, in light of the Court's own searching inquiry into and resolution of this matter, and as creating the potential for mischief if the Attorney General's critics would seek to exploit such proceedings for political purposes. For these reasons, the Court will not, on its own initiative, refer this matter to a bar association for further action, and the Court further believes that any such effort initiated by any other person or group would be inappropriate and unnecessary.

Nonetheless, the Court finds that the bar disciplinary scheme provides a useful point of reference in determining the appropriate sanction here. The American Bar Association, for example, has developed a set of standards for imposing lawyer sanctions, based on a number of considerations that the Court finds relevant and helpful in resolving the present matter. n23 First, the ABA Standards outline a sequence of disciplinary sanctions, ranging from the least severe, admonition, to the most, disbarment. See ABA Standards for Imposing Lawyer Sanctions, § § 2.2-2.6. n24 Next, the Standards characterize different forms of attorney [**118] misconduct by reference [*763] to (i) the nature of the ethical duty violated, (ii) the lawyer's mental state, (iii) the extent of the actual or potential injury caused by the lawyer's conduct, and (iv) any aggravating or mitigating factors. See ABA Standards, § 3.0. Upon performing the analysis suggested under these Standards, the Court finds that the least severe form of sanction, an admonition, is warranted here.

n23 The Michigan courts have expressly adopted the ABA standards. See *Grievance Administrator v. Lopatin, 462 Mich. 235, 612 N.W.2d 120, 123 (2000)*.

n24 Again, Michigan has adopted the same range of sanctions. See Michigan Court *Rule 9.106*.

Regarding the nature of the duty violated here, the Court finds that the Attorney General's conduct implicates duties owed to the legal system. Within this general rubric, the ABA Standards distinguish among (i) false statements, fraud, and misrepresentation; (ii) abuse of the legal process; and (iii) improper communications with individuals [**119] in the legal system. See ABA Standards, § § 6.1-6.3. The second of these categories is most applicable here, as it encompasses a "failure to obey any obligation under the rules of a tribunal." See id., § 6.2. The Standards then provide:

> Absent aggravating or mitigating circumstances, . . . the following sanctions are generally appropriate in cases involving . . . failure to obey any obligation under the rules of a tribunal . . . :
>
> 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
>
> 6.22 Suspension is generally appropriate when

> a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes [**120] interference or potential interference with a legal proceeding.
>
> 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

ABA Standards, § 6.2.

In this Court's view, the violations here fall at the boundary of those warranting a reprimand and those calling for an admonition. Because the Attorney General did not willfully violate the Court's Order, the more severe forms of discipline clearly are not warranted in this case. Rather, the Attorney General's public statements about this case were a product of inadvertence, thereby suggesting a choice between a reprimand and an admonition.

Under the totality of the circumstances presented, the Court finds that the latter, less severe form of sanction is best suited to address the Attorney General's conduct. Although the Attorney General violated the Court's Order on two occasions, the length of time between these incidents and the arguable lack of notice at the time of the first violation lead the [**121] Court to view the Attorney General's conduct as "isolated," and hence deserving of a lesser sanction. Next, while the Attorney General's comments created a real potential for prejudice and interference with these proceedings, the Court already has observed that no actual prejudice resulted from these remarks.

Moreover, several of the mitigating factors outlined in the ABA Standards tip the [*764] balance decisively toward the lesser sanction of admonition. There is no evidence of an improper motive here, see id., § 9.32(b) -- to the contrary, the Attorney General made the statements at issue in service of his legitimate and vital obligation to keep the Nation informed about the Justice Department's efforts in the war on terror. In addition, particularly with regard to the first statement, the Attorney General's Office made a "timely good faith effort . . . to rectify [the] consequences of" the remarks by issuing a prompt retraction. See id., § 9.32(d). Finally, and most importantly, the Attorney General has cooperated in this matter, see id., § 9.32(e), and has issued a personal apology to the Court and counsel, see id., § 9.32(m). As observed earlier, the Court places [**122] great weight on this expression of regret, as well as the Attorney General's personal assurance that he will make every effort to ensure that his public statements in the future do not include inappropriate references to pending cases.

Consequently, the Court elects to formally and publicly admonish the Attorney General for his public statements about this case, which violated the Court's October 23, 2001 Order. n25 The Court has selected this sanction -- the most modest among the range of disciplinary measures that may be imposed upon attorneys -- because of the inadvertent nature of the violations here, and because of the Attorney General's personal apology and assurance that such incidents will not occur in the future. In electing to impose this sanction, this Court's principal objective is not to punish, but instead to encourage procedural reforms in the Attorney General's Office, so that staff members with professional prosecutorial experience are fully involved in the process of formulating public statements that refer to pending cases or investigations. Through this or equivalent means, the Court hopes and expects that the incidents which arose in this case will not recur in [**123] subsequent proceedings.

> n25 The Court recognizes that admonitions generally are a private form of discipline. See ABA Standards, § 2.6; see also Michigan Court *Rule 9.106(6)*. Nonetheless, the Attorney General's statements about this case were widely reported in the media, Defendants' motion is part of the public record in this case, and the possibility of contempt proceedings against the

Attorney General has been a frequent topic in news accounts of this case. More generally, the position of Attorney General is, by its very nature, a highly visible and public office. Indeed, it is for precisely this reason that his statements about this case were particularly problematic. Under these circumstances, the Court's resolution of this matter necessarily and unavoidably is, and should be, available for public scrutiny.

IV. CONCLUSION

In his November 26, 2003 letter to the Court, Attorney General Ashcroft rightly observes that "this was, of course, a very important terrorism case for our nation and [**124] the Department of Justice, and as the Attorney General, I have a duty to keep the American people informed of the Department's progress against terrorism." In response, defense counsel just as aptly observes that "there was no superior duty on the part of an Attorney General that transcended the defendants' right to a fair trial." These dual obligations may pose a considerable challenge, particularly at critical times in our Nation's history, but it is essential to the proper functioning of our system of justice that the Attorney General strike the proper balance between these roles.

More specifically, in circumstances like those presented here, the Attorney General must ensure that his public comments about pending cases are carefully crafted and reviewed to avoid any potential prejudice [*765] to the parties or interference with the proceedings. The Attorney General and his staff fell short of this standard on two occasions in this case, violating an Order which prohibited such potentially prejudicial public remarks. Upon considering all of the circumstances surrounding these incidents, the Court determines that criminal contempt proceedings are not warranted, but that the modest sanction [**125] of admonishment is instead appropriate.

For these reasons, NOW, THEREFORE, IT IS HEREBY ORDERED that Defendants' August 28, 2003 Motion to Require Attorney General John Ashcroft to Show Cause Why He Should Not Be Held in Contempt is DENIED. Instead, IT IS ORDERED that Attorney General John Ashcroft be, and hereby is, formally and publicly admonished for violating the Court's October 23, 2001 Order.

/s/

Gerald E. Rosen

United States District Judge

Rules of Professional Conduct: Scope

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for interpreting the Rules and practicing in compliance with them.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[3] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer's duty to others. Moreover, nothing in the Rules or

associated Comments or this Scope section is intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding. A tribunal presented with claims that the conduct of a lawyer appearing before that tribunal requires, for example, disqualification of the lawyer and/or the lawyer's firm may take such action as seems appropriate in the circumstances, which may or may not involve disqualification.

[5] In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of Rule 1.3 are not intended to govern conflicts of interest, which are particularly discussed in Rules 1.7, 1.8, and 1.9. Thus, conduct that is proper under the specific conflicts rules is not improper under the more general rule of Rule 1.3. Except where the principle of priority stated here is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a lawyer has analyzed the ethical considerations under a given rule, the lawyer must generally extend the analysis to ensure compliance with all other applicable rules.

[6] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. This note on Scope provides general orientation and general rules of interpretation. The Comments are intended as guides to interpretation, but the text of each Rule is controlling.

Go to...